In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 73

Office Supreme Court, U.S.

STATE OF ALASKA
and
WALTER J. HICKEL, Governor of the State of Alaska, G. KENT EDWARDS, Attorney General of the State of Alaska, THOMAS J. MOORE, Commissioner of Labor of the State of Alaska, LEO A. PHILLIPS, ALFRED M. WHITE and WILLIAM JONES, members of International Union of Operating Engineers, Local 302,

Appellants,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; WILLIAM TYREE, CLARK INGRAM, JAMES O. GREEN, KENNETH E. WRIGHT, DONALD E. CONNER, ARLIN A. DECHANEY, and NATIONAL LABOR RELATIONS BOARD,

Appellees.

Appeal from the United States District Court for the District of Alaska, Consolidated Cases Nos. J-18-67 and J-19-67, Reported in 287 F.Supp. 589 (D. Alaska, 1968)

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to United States Supreme Court Rules 13(2) and 15, appellants file this statement indicating

the basis on which this Court has jurisdiction, on a direct appeal, to review the final judgment of permanent injunction in question and to exercise such jurisdiction through plenary consideration of the questions presented.

OPINION BELOW

The opinion of the three-judge District Court, constituting its findings of facts and conclusions of law, granted to appellees a permanent injunction prohibiting enforcement (a) of the Alaska Local Union Autonomy Act, Ch. 8, SLA 1967, Alaska Statutes 23.40.045 to 23.40.060, as amended in 1968, which the Court ruled unconstitutional in its entirety, and (b) of a preliminary injunction issued by the Superior Court of the State of Alaska, in a suit instituted by appellant State of Alaska, restraining conduct of appellee Local 302, found to constitute a public nuisance and to violate or infringe upon personal and property rights of resident union members in the State of Alaska through discrimination in hiring hall practices. Copies of the judgment below, the opinion of the United States District Court and the unreported opinion of the Alaska Superior Court issuing the preliminary injunction are appended to this jurisdictional statement.

JURISDICTION

The appeal herein is from a final judgment made and entered by a three-judge United States District Court for the District of Alaska, specially constituted

pursuant to 28 U.S.C. §§ 2281 and 2284 upon the appellees' application. Appellees sought a declaratory judgment decreeing an Alaska statute, the "Local Union Autonomy Act," Ch. 8, SLA 1967, codified as AS 23.40.045 to 23.40.060, as repugnant, *inter alia,* to the Supremacy Clause, Art. VI § 2, of the United States Constitution. Appellees further sought a permanent injunction restraining enforcement of the Alaska Superior Court's preliminary injunction which prohibited, during the pendency of the State action, acts of public nuisance, job discrimination and denial of fair representation to its members, by appellees, representing a continuing danger to the public welfare of Alaska residents.

The District Court held the Alaska Local Union Autonomy Act unconstitutional in its entirety as a violation of the Supremacy Clause, and permanently restrained its enforcement on the ground that it applied on its face to subject matter pre-empted by the Labor Management Relations Act, 29 U.S.C. §§ 151 *et seq.* (L.M.R.A.) The statute (AS 23.40.050 *et seq.*, SLA 1967, Chap. 8) and the 1968 amendments thereto (SLA 1968, Chap. 231) are reprinted in full in the appendix. The District Court further permanently enjoined enforcement of the preliminary injunction of the Superior Court granted to appellants pursuant to State common law of public nuisance as well as under certain statutory authority (*vide infra*), on the same ground of pre-emption.

The final judgment appealed from was made on August 23, 1968 and entered on August 26, 1968.

Notice of appeal was filed in the United States District Court for the District of Alaska on September 9, 1968.

This Court has jurisdiction to review by direct appeal the judgment and decree in question, pursuant to 28 U.S.C. § 1253.

The following cases are believed to sustain directly the jurisdiction of the Supreme Court to review the judgment and decree on direct appeal and upon plenary consideration: *Vaca v. Sipes,* 386 U.S. 171 (1967); *Local Teamsters 174 v. Lucas Flour Co.,* 369 U.S. 95 (1962); *DeVeau v. Braisted,* 363 U.S. 144 (1960); *International Assn. of Machinists v. Gonzales,* 356 U.S. 617 (1958); *Youngdahl v. Rainfair,* 355 U.S. 131 (1957); *UAW v. Russell,* 356 U.S. 634 (1958); *United Construction Workers v. Laburnum Construction Corp.,* 347 U.S. 656 (1954.) In addition, an often-stated principle in the following cases is believed to further sustain jurisdiction: *Hill v. Florida,* 325 U.S. 538 (1945); *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959); *Local 100 of United Assn. of Journeymen & Apprentices v. Borden,* 373 U.S. 690 (1963); *Nash v. Florida Indust. Comm.,* 389 U.S. 235 (1967).

QUESTIONS PRESENTED

There are established exceptions to federal preemption in labor controversies. A primary exception to exclusive National Labor Relations Board jurisdiction are those cases involving an immediate and

overriding State interest, such as union-created practices of discrimination and acts constituting a public nuisance which endanger the welfare of entire communities. Another significant exception to pre-emption is where assertion of State Court jurisdiction over discriminary practices violative of a union's duty of fair representation to all its members presents no obstacle to and does not conflict with enforcement of the L.M.R.A.

Notwithstanding these exceptions, which are applicable both to enforcement of the Alaska Local Union Autonomy Act and the Alaska Superior Court's preliminary injunction (which is primarily concerned with the denial of fair representation) the District Court concluded that both the subject matter of the Alaska statute and of the State Court injunction were not within the ambit of permissible State Court jurisdiction. The District Court held both to be in conflict with a federal policy—the freedom of union members to choose their collective bargaining agents —a policy clearly peripheral to both the Act and the subject matter of the common law nuisance suit brought by appellants and equally clearly *not* in conflict with either.[1] The principal questions thereby presented are:

(1) Whether the Labor-Management Relations Act provides an adequate remedy against the economic and social harm to Alaska's citizens which the

[1]It should be noted that the Local Autonomy Act, by its terms, applies only to the International Union, while the State Court injunction was directed primarily at discriminatory acts on the part of appellee Local 302.

Alaska Superior Court found to constitute a public nuisance and a denial of fair representation.

(2) Whether the Alaska Local Union Autonomy Act, which *increases*, not decreases, the opportunity for free choice of local union representation, is an obstacle to the freedom of members of Local 302 to choose collective bargaining agents or adversely affects any other national labor policy and hence is within the preemption rule announced in *Hill v. Florida*, 325 U.S. 538 (1945).

(3) Whether the Alaska Superior Court injunction may reasonably be interpreted to impinge upon any area preempted by Congress, or, obversely, whether the duty of fair representation required of the International Union of Operating Engineers and whose standards have been established by the Court and not the NLRB, falls within the rationale of *Vaca v. Sipes*, 386 U.S. 171 (1967), and is thereby cognizable in a State Court proceeding.

STATEMENT OF THE CASE

International Union of Operating Engineers, AFL-CIO, is an international labor organization. Local 302 of the International Union has its headquarters in Seattle, Washington, and a clear majority of its members are Washington residents. The individual appellees are Seattle officials and members of the Local's management. For several years Local 302 has discriminated against its minority Alaska resident members by dispatching Seattle-resident members hun-

dreds and even thousands of miles to Alaska job sites instead of using local job pools, while flagrantly violating seniority rights of the Alaska members. Moreover, the persons in charge of Alaskan hiring halls, which enjoy a contractual monopoly with respect to Alaskan jobs in the vital construction industry, are appointed by Seattle based union officers and hold their powerful positions at the pleasure of officials dependent for their own tenure on the continued support of Washington residents.

This discrimination has resulted in serious problems of economic deprivation for the Alaska members, their families and for the communities in which they live. Because workers of the Local are transported during part of the year from Seattle to perform work otherwise available to Alaska members, the latter have suffered chronic unemployment, the highest, percentage-wise, of any State in the nation. The State of Alaska has been required to provide them with unemployment and welfare benefits, which would be unnecessary but for the Local's discriminatory dispatching practices. The purchasing power of the Alaska members and their families has long been reduced and the community as a whole suffers while Alaska workers remain idle and Washington workers return to their own state upon completion of job assignments, not infrequently only to draw upon and deplete Alaska's overburdened unemployment insurance funds. Concomitantly, Alaska employers, including the Alaska Chapter of the Associated Contractors of America, Inc., with whom Local 302 has a collective

bargaining agreement, must pay the imported workers' travel expenses and wages for travel time. These costs are passed on to the Alaska consumers without any corresponding benefits to Alaska.

These persistent discriminatory practices and resulting numerous complaints by Alaskan citizens led to investigations by the State Department of Labor and by the Alaska State Senate. As a result of these investigations the Alaska Legislature enacted the Local Union Autonomy Act to take effect on May 25, 1967. Despite passage of the Act, the discrimination nevertheless continued unchecked and took the additional form of increased pressure by non-Alaska union officials against members favoring establishment of an autonomous local union, as encouraged by the Local Autonomy Act. Indeed, it was found by a Special Labor-Management Committee of the Alaska State Senate, in a report dated July 17, 1967, that non-compliance with the Act was continuing unabated, causing widespread hardship, unemployment and serious unrest. Following the report, the Legislature amended the Act in 1968 and the Secretary of Labor promulgated an emergency regulation requiring international labor organizations with one hundred or more resident Alaska members to charter a local organization within Alaska.

On October 13, 1967, in an effort to end the continued discrimination and denial of fair representation to Alaskan members by Seattle based appellee Local 302, as well as to prevent further economic blight to local Alaska communities, the State of

Alaska filed a civil action in the State Superior Court, at Anchorage, to enjoin the discriminatory practices and to require Local 302 to perform its judicially defined duty of fair representation to all members of the Local.[2] The State concurrently filed a criminal action under the penal provisions of the Act; however, the State suspended the criminal proceeding and stipulated not to resume the same until the issue of preemption has been authoritatively decided.[3] The defendants in both actions were Local 302 and individual members responsible for the policy and acts of discrimination and for the continued and flagrant breach of their duty of fair representation of *all* members of the union, based on seniority and the hiring provisions of existing collective bargaining agreements.

On December 18, 1967, defendants filed a motion to dismiss the civil action on the ground, *inter alia,* that remedies sought by the State on behalf of all Alaska citizens were available under the Labor Management Relations Act through the NLRB (ignoring the fact that only union members could avail themselves of such *discretionary* remedies under the federal statute) and thereby covered a subject matter preempted by Congress. Even while the motion to dis-

[2]The action was brought pursuant to AS 23.05.060, empowering the Department of Labor to enforce all State labor laws; AS 23.05.130, authorizing the Department to assist resident workers with respect to employment rights; and AS 23.05.210, empowering the Attorney General to civilly prosecute cases referred to him by the Department of Labor.

[3]In a spirit of cooperation, no arrests were made, no bail required and non-resident defendants were allowed to appear through their counsel.

miss was under consideration, the discriminatory dispatching practices continued. The State accordingly moved, on January 11, 1968, for a preliminary injunction, supported by extensive documentation, to take effect during the pendency of the action.

On March 8, 1968, the Superior Court denied defendants' motion to dismiss and issued the preliminary injunction requested by the State, solely on the ground of public nuisance and discriminatory denial of fair representation;[4] it expressly refused to grant interim relief under the Local Autonomy Act. In granting the injunction the Court also found an overriding State interest in dealing with the widespread problems fostered by decades of job discrimination and hence it upheld its own jurisdiction. The discriminatory practices in job dispatching, the Court found, "are harmful, not only to the members against whom the discrimination is practiced, but to the people of the State of Alaska, in requiring the outlay of public funds for unemployment and welfare relief for such members and their families, and in depriving such members of earnings which would otherwise flow into the economy of the State and thereby benefit the citizens of the State generally." (Superior Court Opinion, at page 21.) The Court, in retaining jurisdiction, ruled against the preemption challenge raised by defendants in their motion to dismiss, as follows:

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[4]In seeking to assert the rights to fair representation of resident union members deprived of employment opportunities for long periods—and hence evidently impecunious, if not indigent, as against the rich and powerful International, the State asserted a right to act under the doctrine of *parens patriae*.

> "I find that the relief sought is not within an area which has arguably been preempted under the Supremacy Clause of the United States Constitution, but is, rather, in the nature of requiring that defendants provide the citizens of Alaska who are members of defendant Local 302 with the fair representation to which they, and the State and its citizens derivatively, are entitled. [citation] . . . I find no conflict with federal authority—'the touchstone of preemption' [citation]." (Superior Court Opinion, at 22.)

Two weeks after this civil action had been instituted by the State, Local 302 and its Seattle officials filed two actions (later consolidated) in the United States District Court for Alaska against the State of Alaska, and its Governor, Attorney General and Commissioner of Labor. The Union applied for a three-judge court to render a declaratory judgment that the Superior Court injunction was invalid and that the Local Autonomy Act was unconstitutional. The National Labor Relations Board was permitted to intervene as a party plaintiff, while adopting *in toto,* the argument of Local 302 that the NLRB held exclusive jurisdiction to decide the controversy at hand.

The State unsuccessfully moved to dismiss the empaneling of the three-judge court on the ground that convening of such a court is improper when the only substantial constitutional issue presented for determination is whether there is federal preemption under the Supremacy Clause.[5]

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[5]Defendants asserted constitutional challenges as follows: imposition of undue restraint on interstate commerce: impairment of contractual obligations; violation of equal privileges and im-

The District Court concluded that there was federal preemption without taking any testimony on the nature or degree of public harm to Alaska or of the overriding interest of the State in ending the discriminatory practices of Local 302. Without ruling on the validity of the State's interest in the case, the Court broadly held that the Local Autonomy Act and its implementing regulations "clearly indicate a state purpose which invades a field preempted by Congress. Impermissively, the Act interferes with the full freedom of workers to choose a bargaining agent (*sic*) and in the collective bargaining process.[6] Because of conflict with federal law and policy, both actual and potential, the Act, as amended, is therefore unconstitutional under the Supremacy Clause." (287 F. Supp. at 594.) There is no finding of fact—nor even a hint of rationalization—in the District Court opinion, as to just how the State Act violates the right of members of Local 302 to choose their collective bargaining agents, how it interferes with the collective bargaining process, how it conflicts with federal labor policy, or, in short, how it invades an area preempted either by the L.M.R.A. or any other congressional pronouncement.

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munities; abridgement of free speech and assembly. Since the District Court made no findings or conclusions on these issues, and since these challenges do not bear on Supreme Court jurisdiction to review this case on direct appeal, these grounds will not be discussed further here. See *California Water Service Co. v. Redding*, 304 U.S. 252 (1938). However, the jurisdiction of the Supreme Court on appeal extends to every question involved in the case. See *Sterling v. Constantin*, 287 U.S. 378 (1932).

[6]*N.B.* That the Alaska Local Autonomy Law only requires chartering of a local union as an additional choice of possible representative, and leaves the ultimate choice of collective bargaining representation to the Federally constituted legal processes.

The Superior Court injunction was similarly swept aside, as supposedly invading an area preempted by Congress, an area which assertedly provides the NLRB with exclusive jurisdiction to decide charges of discrimination against a union for violating its duty of fairly representing all its members. The enforcement of the injunction was summarily and permanently enjoined, and the officers, agents and employees of the State of Alaska were ordered not to enforce the Local Autonomy Act and its regulations. This appeal followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. THE CONSTITUTIONAL QUESTION OF FEDERAL PREEMPTION

The District Court has held the Alaska Local Union Autonomy Act unconstitutional in its entirely on the ground of its asserted direct conflict with the freedom of union members to choose collective bargaining agents.

This is a remarkable statutory construction, since the statute produces exactly the opposite effect from that envisioned by the Court. As a whole the Act promotes, rather than discourages collective bargaining, by permitting Alaska resident members of the International Union of Operating Engineers to select their own bargaining agents to fairly represent them.[7]

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[7]The last N.L.R.B. sponsored election gave Alaskan workers only a choice between the Seattle Local or "no union." Had the Local Autonomy Law been allowed to become operative, a third option—an Alaskan Local—would have been added to the free choice.

Because the statute eliminates the need for Alaska workers to rely on union officials who continuously have deprived them of their seniority rights and of their livelihood, unless they are prepared to reject union representation altogether, this does not serve to characterize the statute as an obstacle to federal labor policy. On the contrary, it would appear to support and effectively implement the objectives of that policy.

Under the statute, once an autonomous local of one hundred or more members is formed in Alaska, the national or international union thereby becomes exempt from the statutory duty to maintain hiring, dispatching and membership records. AS 23.40.045 (a). The requirement for maintenance of these records is, of course, to protect against the kind of systematic discrimination in job assignments practiced by Local 302 against its minority Alaska members, as found by the Alaska Legislature after a careful study of the facts—facts completely ignored by the District Court. The statute thus does not restrict nor even purport to affect in any manner the collective bargaining process. It exclusively concerns itself with establishing a degree of regulation over out-of-state unions asserting absentee control over Alaskan hiring halls, in order to prevent discriminatory conduct detrimental to the welfare of Alaska members, their families and communities.

The only section of the Act which even remotely concerns the collective bargaining process as such is § 23.40.050, which makes it unlawful for national or international unions with one hundred or more Alaska

resident members to fail to charter a local union within Alaska. This provision in effect *requires Local* 302 to either end its persistent unfair and discriminatory representation or to establish an Alaska local which will be available to represent its Alaska members if they so choose, within the framework of the L.M.R.A.

Such State promotion of a climate of fair representation cannot fairly be said to conflict with, or be an obstacle to any national labor policy. However, the District Court apparently concluded that even where a union has flagrantly and continuously violated the rights of many of its members, with widespread economic consequences, nevertheless the State's public interest in protecting the security and welfare of its citizens and residents does not permit it to take any corrective acts, either legislatively or judicially, irrespective of the quantum of harm or of the legitimate need for State intervention. This holding leaves no remedy to either Alaska or to its resident members of Local 302, for the National Labor Relations Board, in its unreviewable discretion, can—and regularly does—refuse to hear charges that Local 302 has engaged, in unfair labor practices in Alaska, under § 8(b) of the Labor Management Relations Act, 29 U.S.C. § 158(b). Compare, *Vaca v. Sipes,* 386 U.S. 171 (1967).[8]

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[8]Neither in *Vaca v. Sipes* (*supra*) nor in any previous case has this Court expressly approved the holding in *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcem't den.* 326 F.2d 172 (2nd Cir. 1963), that a breach of the duty of fair representation must be classified as an unfair labor practice under §8(b), thereby giving the N.L.R.B. exclusive jurisdiction to entertain such cases.

In thus divesting the State Court of jurisdiction, the District Court has reached a result in direct conflict with the *rationale* of *Vaca v. Sipes,* (*supra*), which authorizes State Court jurisdiction in unfair representation cases. Other Supreme Court cases relied on by the District Court in ruling in favor of federal preemption refer to specific exceptions to preemption. These exceptions, here manifestly applicable, permit State legislative and judicial jurisdiction in cases of overriding State interest. The principles enunciated in both *Vaca* and the other decisions of this Court require the conclusion that the District Court erred in declaring unconstitutional the Local Autonomy Act and in precluding the exercise of State Court jurisdiction to enjoin the public nuisance created by Local 302. If the District Court opinion were allowed to remain intact, the authority of *Vaca,* as well as the interstitial federal-state character of labor problems peripheral to the L.M.R.A.—and hence without certainty of redress—would be seriously undermined.

The express language and purpose of the Local Autonomy Act clearly preclude a construction that the Act enters a restrictive area of national labor policy reserved to the exclusive jurisdiction of the NLRB. Those provisions of the Act which impose upon Local 302 the obligation to fairly represent its Alaska resident members do no more than reaffirm the traditional, judicially defined duty of a labor union to fairly represent all its members. *Vaca* clarifies the proposition that suits for breach of this duty are

cognizable in State courts, irrespective of whether the union conduct in question is also an unfair labor practice within the meaning of §8(b).[9]

Vaca holds that the preemption guidelines of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), are never to be rigidly applied, as did the District Court in the case at bar, to preempt State involvement in cases of unfair representation. As Mr. Justice White pointed out in the *Vaca* majority opinion, the withholding of preemption in cases of unfair representation does not injuriously affect national labor policy, since the standards of fair representation were first *judicially* developed and applied, and are the same standards now applied by the NLRB in unfair labor practice cases, where the General Counsel chooses to do so.[10]

Moreover, because the NLRB has traditionally not asserted jurisdiction in cases of unfair representation, while the courts have, the Board certainly possesses no greater expertise in this field than do the courts. The General Counsel of the NLRB, moreover, exercises unreviewable discretion in the issuance of complaints against unfair labor practices, and there thus is the clear risk—shown by Alaska's experience—that complaints of unfair representation will not be prose-

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[9] *Vaca* recognizes the doubtful efficacy of this belated recognition of the problem by the Board.

[10] See *United Construction Workers v. Laburnum Const. Corp.,* 347 U.S. 656 (1954); *Youngdahl v. Rainfair,* 355 U.S. 131 (1957); *UAW v. Russell,* 356 U.S. 634 (1958); *Teamsters Local 174 v. Lucas Flour Corp.,* 369 U.S. 94 (1962); *Vaca v. Sipes* (*supra*); *IAM v. Gonzales,* 356 U.S. 617 (1958).

cuted if the NLRB is allowed exclusive jurisdiction. Particularly in cases where a significant state interest overshadows the harm to individual employees, the theoretical need for a "consistent" labor policy to be administered by the NLRB becomes manifestly immaterial.

In the *Garmon* opinion, in reviewing earlier cases, this Court expressly characterized the outer boundaries of federal preemption as being at an end, "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the states of the power to act [citations to previous decisions]." (359 U.S. at 243-44.) The kind of compelling congressional direction the Supreme Court had in mind is reflected in cases like *Hill v. Florida*, 325 U.S. 538 (1945), and *Nash v. Florida Indust. Comm.*, 389 U.S. 235 (1967), where State legislation conflicts, with arguable certainty, with a clearly defined national policy and not merely with a theorized abstract federal preference.

The Court below relied strongly on *Local 100 of United Assn. of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963), in attempting to distinguish *Vaca*. In mistakenly characterizing the purpose of the Superior Court preliminary injunction, the District Court stated as follows: "The alleged discrimination which is here prohibited by the Superior Court injunction—job referral discrimination to strengthen union authority (sic)—clearly is within the exclusive

jurisdiction of the National Labor Relations Board." (287 F.Supp. at 595.) The opinion in *Borden* actually concludes that exclusive NLRB jurisdiction should result *only* "in the *absence* of an overriding state interest." (373 U.S. at 693; emphasis added.)

Judge Lewis, of the Alaska Superior Court, found that the State had made out a *prima facie* case of systematic discriminatory practices by Local 302. It further found that these practices caused sufficient public harm to result in legitimate concern to the State of Alaska. These findings, together with similar findings in *DeVeau v. Braisted,* 363 U.S. 144 (1960), should have resulted in a holding against federal preemption, both as to the State Court injunction and the Local Autonomy Act. If the State of New York is entitled, as *DeVeau* holds, to clean up its waterfront by prohibiting conduct which is arguably an unfair labor practice, then the State of Alaska is equally entitled to protect its citizens through legislative and judicial remedies.

Unfortunately, the District Court took a narrow view of *DeVeau* by refusing its application on the ground that Congress had approved the New York statute while it has not approved the Local Autonomy Act. There is no *requirement* of congressional approval in *DeVeau* or in any other case, and the constitutional authority of states to regulate labor conduct would be vitiated if this narrow view were permitted to stand.

The ruling of the District Court on the single constitutional issue passed on, is not only in conflict with

Vaca, but is contrary to the wholesome and realistic balance struck between federal and state interests in all preemption cases. The Court below has taken away all rights and remedies which Alaska members of Local 302 might have enjoyed in insuring their seniority rights and their collective and individual rights to be fairly represented by their union, which holds complete and exclusive power of life and death over their ability to make a living. By also removing the sanctions of the Local Autonomy Act, the District Court has encouraged and ratified discriminatory conduct while the State is rendered helpless to cope with serious public harm, the existence of which is not seriously challenged anywhere in this record.

More is involved here than the rights of the parties litigant. The State of Alaska has an important stake in the outcome, and, if the District Court opinion is permitted to remain unchallenged, no possible method exists to protect Alaska from the consequences of Local 302's now unfettered power of economic exploitation. There is and can be no congressional policy against state intervention in such a situation. There is no compelling need to place exclusive jurisdiction with the NLRB, nor can so destructive an inroad into our balanced federal system be justified in the absence of overriding national concerns.

B. OTHER ERRORS OF THE DISTRICT COURT

The State of Alaska below challenged as improvident the empaneling of a three-judge court. The Court below rejected this challenge and also denied a motion by Alaska members of Local 302 for intervention as parties defendant. In addition, part of the judgment purports to uphold the binding validity of a collective bargaining agreement between Local 302 and the Alaska Chapter of Associated General Contractors of America, Inc. However, no such issue appears to be framed by the pleadings, nor is there any finding of fact or conclusion of law or other explanation or rationalization set forth in the opinion to support this portion of the judgment.

Appellants contend that both these rulings and this extraneous part of the judgment constitute error. However, because the constitutional question is clearly substantial, it does not seem necessary to cover these points in this jurisdictional statement, beyond mentioning their existence.

CONCLUSION

The three-judge District Court improperly held that the Alaska Local Union Autonomy Act and the public nuisance action initiated in the Superior Court, by the State of Alaska invade subject matter preempted by Congress. The findings of the State Court demonstrate the existence of an overriding interest on the part of Alaska to assert both legislative and judicial jurisdiction to end long standing policies of deny-

ing to Alaskan residents their right to fair representation by Local 302. The District Court's deviation from existing precedents is harmful to the guidelines of preemption carefully worked out by this Court, particularly those establishing standards for concurrent jurisdiction as set forth in *Vaca v. Sipes* (*supra*).

Appellants earnestly request this Court to deem this case appropriate for plenary consideration and for reversal of the District Court's judgment.

Dated: November 8, 1968.

Respectfully submitted,

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(Appendices A, B, C and D Follow.)

Appendix A

In the United States District Court for the District of Alaska, at Juneau

Civil Action No. J-19-67

International Union of Operating Engineers, Local 302, AFL-CIO, a labor union,
Plaintiff,

vs.

The Alaska Chapter of Associated General Contractors of America Inc., an employer,
Defendant,

and

The State of Alaska,
Defendant-Intervenor.

JUDGMENT

The above-entitled matter having been consolidated; for all purposes, with Cause No. J-18-67, and a Three Judge Court having previously been ordered in each case, pursuant to the provisions of 28 USC, section

2281, and the matters having come regularly before the Court for hearing on the merits on June 24, 1968, upon the pleadings and Stipulation of Facts, and all parties having been heard, and the Court having on the 1st day of August, 1968, made and filed herein its Memorandum Opinion, which by its terms serves as Findings of Fact and Conclusions of Law in accordance with Rule 52 FRCP; now, therefore

It Is Ordered, Adjudged and Decreed as follows:

(1) Those certain Alaska statutes codified as A.S. 23.40.045 to A.S. 23.40.060 inclusive are hereby declared to be unconstitutional as in violation of the Supremacy Clause of the United States Constitution (Art. VI sec. 2) as an invasion of an area pre-empted by Congress in the Labor Management Relations Act of 1947 as amended (Art. VI § 2) as invasion of an area pre-empted by Congress in the Labor Management Relations Act of 1947 as amended (29 USC sections 151 ff).

(2) All officers, agents, or employees of the State of Alaska are permanently enjoined from enforcing A. S. 23.40.045 to 23.40.060, inclusive, and the regulations promulgated thereunder, or from initiating or prosecuting any proceeding under purported authority of the same.

(3) The enforcement of the Superior Court's preliminary injunction in Cause No. 67-2024E, Superior Court for the State of Alaska, Third Judicial Dis-

trict, entered on March 8, 1968, is permanently enjoined.

Dated this 23rd day of August, 1968.

Walter Ely
United States Circuit Judge
Raymond E. Plummer
James A. von der Heydt
United States District Judges

R. Boochever
of Faulkner, Banfield, Boochever & Doogan
Room 201, 311 Franklin Street
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Attorneys for Plaintiffs

Filed August 26, 1968.

Appendix B

In the United States States District Court
for the District of Alaska

William Tyree, Clark Ingram, James O. Green, Kenneth E. Wright, Donald E. Conner, Arlin A. DeChaney and International Union of Operating Engineers, Local 302, AFL-CIO, a Labor union, Plaintiffs, and National Labor Relations Board, Plaintiff-intervenor, vs. G. Kent Edwards, Attorney General of the State of Alaska; Thomas J. Moore, Commissioner of Labor of the State of Alaska; and Walter J. Hickel, Governor of the State of Alaska, Defendants.	J-18-67	Consolidated
International Union of Operating Engineers, Local 302, AFL-CIO, a labor union, Plaintiff, vs. The Alaska Chapter of Associated General Contractors of America, Inc., an employer, Defendant, and State of Alaska, Defendant-intervenor.	J-19-67	Consolidated

OPINION

Before: The Honorable Walter Ely, Circuit Judge, and The Honorable Raymond E. Plummer and the Honorable James A. von der Heydt, District Judges.

von der Heydt, District Judge:

Plaintiffs seek a declaratory judgment decreasing Alaska's Local Union Autonomy Act", as amended,

to be unconstitutional, and a permanent injunction restraining enforcement thereof.

The causes have been consolidated by order of the Court for all proceedings subsequent to March 27, 1968. Prior to consolidation, an identical three judge district court, as provided by Title 28, U.S.C., Sec. 2284, had been designated by the Chief Judge of the Circuit to hear and determine the appropriate issues presented in each case.

The three judge court so designated convened to hear arguments on the merits at Juneau, Alaska, June 24, 1968, following which the Court took the cause under advisement.

The facts, briefly, are these. Plaintiffs are an international labor organization, Local 302, which is a member thereof, and individual members of the local union. The National Labor Relations Board has appeared as an Intervenor-Plaintiff. Defendants are the State of Alaska, its Governor, Attorney General, Commissioner of Labor, and the Alaska Chapter of Associated Contractors of America, Inc., the latter designated as "an employer".

Local 302 is headquartered at Seattle, Washington, and does business in Alaska and Washington. A majority of its members reside outside the State of Alaska.

It appears that Alaska's Commissioner of Labor, over a period of time, has received numerous complaints that Local 302 discriminates against its Alaska resident members in job referrals, in favor of those members residing outside the State of Alaska. After

legislative passage of the original Act in early 1967, a State Senate committee was established further to investigate the problem. By its report, dated July 17, 1967, the committee concluded that Local 302 in fact did discriminate against resident Alaska workers, and particularly against those who favored a local autonomous union, by dispatching non-residents from Seattle to jobs in Alaska. Subsequent to this report, the 1968 Legislature enacted amendments to the local autonomy statute. The entire Act, as amended, is challenged here.

The Attorney General of Alaska brought both civil and criminal proceedings in the State courts to enforce the Act. The civil proceedings resulted in an injunction entered by the Superior Court. The Attorney General of Alaska has stipulated to withhold prosecution of all state proceedings, pending this Court's decision on the issues before it.

We confine ourselves to a determination of two questions:

1. The constitutionality of Alaska Statutes, Sections 23.40.045 to 23.40.060, the so-called "Local Autonomy Act".
2. The validity of the injunction issued March 8, 1968, by the Superior Court of the State of Alaska, Third District of Alaska, at Anchorage.

The local Autonomy Act, as amended, is as follows:

> Sec. 23.40.045. Records. (a) A person who or labor organization which operates a hiring-hall or furnishes labor exclusively under a labor-management contract and which does not have a char-

tered local in this state shall maintain accurate hiring, dispatching and membership records in accordance with regulations promulgated by the commissioner.

(b) The records required under (a) of this section shall be open to inspection by the commissioner or his authorized representative.

Sec. 23.40.050. Local Labor Organizations. It shall be unlawful for any national or international labor organization having 100 or more members in good standing who reside or work in Alaska not to have at all times one or more duly chartered and established local organizations in this state.

Sec. 23.40.052. Interference in Chartering Prohibited. It shall be unlawful for an officer of any national, international labor or local labor organization, having 100 or more members in good standing who reside or work in Alaska to wilfully discourage or impede or attempt to discourage or impede, by means of coercion or other unlawful act, the chartering and establishment of a local organization in this state in accordance with sec. 50 of this chapter. However, this section does not apply to a labor organization which has a chartered local in this state.

Sec. 23.40.054 Civil Enforcement. In addition to the criminal penalties provided for in this chapter, the attorney general may enforce the provisions of this chapter by appropriate civil proceedings, including injunctive relief, against threatened, repeated or continuous violations of this chapter or regulations adopted under it. These proceedings may be brought against an international, national or local labor organization

or an officer of an international, national or local labor organization.

Sec. 23.40.056. Exemptions. (a) The commissioner may grant an exemption from the provisions of secs. 45-60 of this chapter to a labor organization which

(1) has so few members who reside in Alaska that chartering and operating a local would work a financial hardship on these members;

(2) maintains local-hire preference provisions in all of its labor-management agreements in the state; or

(3) maintains provisions in its constitution and bylaws for the election, by and from among the members of the organization who reside in Alaska, of a business agent or other person in charge of hiring-hall in Alaska, and dispatch and grievance procedures.

(b) Exemptions granted under this section shall be applied for and issued on an annual basis in accordance with regulations adopted by the department.

Sec. 23.40.060. Penalties. (a) Any national or international labor organization which violates sec. 50 of this chapter, upon conviction, is punishable by a fine of not less than $1,000 or more than $10,000.

(b) An officer of any national, international or local labor organization who violates sec. 52 of this chapter is punishable, upon conviction, by a fine of not more than $1,000 or by imprisonment of not more than one year, or by both.

(c) Failure to maintain accurate records in accordance with sec. 45(a) of this chapter and the regulations promulgated under it is a misdemeanor punishable by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both.

(d) Wilful failure to comply with sec. 45(b) of this chapter is a misdemeanor punishable by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both.

Plaintiffs assert that the statute is unconstitutional because it:

1) conflicts with the National Labor Relations Act[1] and is thus unconstitutional under the Supremacy Clause.[2]

2) imposes an undue restraint upon interstate commerce.

3) impairs obligations of the Union's present contract with the Associated General Contractors.

4) violates the Equal Privileges and Immunities Clause.

5) impairs plaintiffs' right of free speech and assembly.[3]

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[1]61 Stat. 136 (1947), as amended, 29 U.S.C. § 151 et seq. (1964).

[2]U.S. CONST., art. VI, § 2.

[3]Plaintiffs also contend that the statutes in question are unconstitutional because they are beyond the power of the State to legislate as an attempted regulation of the internal affairs of unincorporated associations, unwarranted by the proper exercise of any police power, and because they are unduly vague and uncertain. These contentions have not been pursued in subsequent pleadings and it is assumed they have been abandoned.

Defendants contend that the Local Autonomy Act is a constitutional exercise of the State's police power, that it does not conflict with the National Labor Relations Act, and that the injunction of the Superior Court is valid and proper.

With this background in mind, we turn to the issues before us. We limit ourselves to plaintiffs' first asserted point, and decide whether the Act in question operates in an area pre-empted by Congress, and is therefore unconstitutional under the Supremacy Clause of the Constitution of the United States. We do so find.

We quote first the "ground rules for preemption" noted by the United States Supreme Court:

> The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably "protected by § 7, or prohibited by § 8" of the National Labor Relations Act. . . . [T]he greatest threat against which the *Garmon* doctrine guards . . . [is] a State's prohibition of activity that the Act indicates must remain unhampered.[4]

Local regulation is invalid if it does or may conflict with federal legislation or policy.[5]

Plaintiffs assert that the statutes in question conflict with the National Labor Relations Act,[6] and cite

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[4] *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n*, 382 U.S. 181, 187, 193 (1965).

[5] *E.g., Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

[6] *Supra*, note 1.

Hill v. Florida.[7] In *Hill* a Florida statute which precluded a convicted felon from serving as a union business agent was declared unconstitutional. The Supreme Court held that the statute interfered with the employees' freedom of choice in selecting a collective bargaining agent, and that such a provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[8] Moreover, since an employer could not bargain with a duly selected representative of the workers unless the union had complied with the Florida statute, it impermissibly interfered in the collective bargaining process.[9] Finally, the Florida statute was held unconstitutional because the union could be enjoined for failure to comply with its record-keeping requirements. Each of these factors is present in this case.

However, defendants contend that *Hill* has, for all practical purposes, been overruled by *DeVeau v. Braisted.*[10] The local statute in *DeVeau,* which was similar to the *Hill* provision, was upheld upheld by the Supreme Court. We disagree with defendants' contention.

The legislation in *DeVeau* was the result of investigations by law enforcement agencies of New York

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[7]325 U.S. 538 (1945).

[8]*Id.* at 542.

[9]Here, the union has brought an action for breach of contract against the Alaska Chapter of the Associated General Contractors, which organization declined to honor its contracts with Local 302 until the latter had complied with the Local Autonomy Act.

[10]363 U.S. 144 (1960).

and New Jersey of corruption and crime on the waterfront, and hearings based on the report of the New York Crime Commission. This compact was submitted to Congress for approval. After conducting an independent investigation Congress approved the compact. As the Supreme Court itself noted, this background distinguishes *DeVeau* from *Hill:*

> The decision in *Hill v. Florida* . . . in no wise obstructs this conclusion. An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was not present in that case. Nor was it true of *Hill v. Florida,* as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry.[11]

If any doubt persists as to the vitality of the *Hill* decision it should be dispelled by the Supreme Court's recent reaffirmance of that case in *Nash v. Florida Industrial Commission.*[12]

We conclude that the statutes comprising the Local Autonomy Act, and regulations relating thereto, clearly indicate a state purpose which invades a field preempted by Congress. Impermissibly, the Act interferes with the full freedom of workers to choose a bargaining agent and in the collective bargaining

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[11] *Id.* at 155.

[12] 389 U.S. 235, 240 (1967).

process.[13] Because of conflict with federal law and policy, both actual and potential, the Act, as amended, is therefore unconstitutional under the Supremacy Clause.[14]

This conclusion obviates the necessity to consider other serious constitutional issues raised by plaintiffs, and we reserve decision as to those questions.[15]

We now turn to the Superior Court's injunction.

On March 8, 1968, the Court granted a preliminary injunction sought by the State. It provides that the union shall not

1) operate its hiring-hall or dispatch members in a discriminatory manner.
2) violate a member's seniority preference under existing collective bargaining agreements.
3) grant an employment preference not based on contract seniority rights to non-Alaska resident members.

Defendants contend that the discrimination which is prohibited by the injunction constitutes a breach of the union's duty to fairly represent its workers, and is permissible under the Supreme Court's recent decision in *Vaca v. Sipes*,[16] regardless of the Local Au-

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[13]See *Hill v. Florida*, note 7 *supra*; *Local 24, International Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959).

[14]*Nash v. Florida Industrial Commission*, note 12 *supra*; *Hill v. Florida*, note 7 *supra*.

[15]See, *e.g.*, *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944); *McNamara v. Remenyi*, 391 F.2d 128 (9th Cir. 1968).

[16]386 U.S. 171 (1967).

tonomy Act. Plaintiffs argue that this preliminary relief, by itself, encroaches on the preemptive sphere of the National Labor Relations Act, since the Board has exclusive jurisdiction to remedy the type of discrimination alleged in the Superior Court proceeding.

In *Vaca* the Court held that a state court has jurisdiction of a worker's suit for a union's breach of its statutory duty of fair representation. The breach of duty which the union member alleged was the union's failure to take his grievance to arbitration under the bargaining agreement's grievance procedure.

We consider now the question of whether the discrimination here alleged is a breach of the duty to fairly represent under the *Vaca* ruling, noting the following language:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, *discriminatory,* or in bad faith.[17]

Two factors on which the *Vaca* decision relies are present here.

First, the Court noted that the Board's General Counsel has unreviewable discretion to decide whether to institute an unfair labor practice complaint, thus leaving a union member without remedy upon his charge that the union breached its duty to fairly represent him. Second, fair representation suits are often intimately related to suits under § 301 o the Labor Management Relations Act charging an employer with

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[17] *Id.* at 190 (emphasis added).

breach of its contract, an action for which state courts have jurisdiction. Here, the Union has already instituted such an action against the Alaska Chapter of Associated General Contractors of America, Inc.[18]

However, there remains one significant difference between *Vaca* and the instant case which we believe to be determinative: the type of discrimination alleged. In *Vaca,* the Court was concerned with discriminatory cases "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB".[19] Clearly, the Court did not intend that state courts were henceforth to have concurrent jurisdiction with the National Labor Relations Board of all unfair labor practices proceedings in which discriminatory conduct is alleged.[20] The alleged discrimination which is here prohibited by the Superior Court injunction—job referral discrimination to strengthen union authority—clearly is within the exclusive jurisdiction of the National Labor Relations Board.[21] Such discrimination constitutes a violation of Section 8(b)(1)(A) of the National Labor Relations Act.[22] It fol-

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[18]See note 9 *supra.*

[19]386 U.S. at 179.

[20]This conclusion is supported by the Supreme Court's reference to the *Garmon* principle, see note 4 *supra* and accompanying text, as "a general rule". 386 U.S. at 179. *Vaca* does, however, seem to leave undecided the standard for determining when it can be fairly inferred that Congress intended exclusive jurisdiction to lie with the National Labor Relations Board. *Compare Vaca v. Sipes,* note 16 *supra,* with *Plumbers' Union v. Borden,* 373 U.S. 690, 694 (1963).

[21]*Plumbers' Union v. Borden,* note 16 *supra.*

[22]29 U.S.C. § 158(b)(1)(A) (1964).

lows, therefore, that the Superior Court was without jurisdiction to grant the preliminary injunction.

We find that all concerned—the public, labor, and employers, are most efficiently served by authority vested by Congress in one federal agency, empowered to reach across the entire nation and bring national consistency to the broad field of labor relations and the related complex problems arising thereunder. The result would be chaotic in the absence of such a consistent policy. Certainly it is not intended that each of the hundreds of state courts of the several states be at liberty, individually, to decide these issues, national in scope and implication. Congress so empowered the National Labor Relations Board, and to that agency, for these purposes, it granted exclusive jurisdiction.

The foregoing makes it clear that we have rejected the contention that this court should await a determination by Alaska's highest court as to whether or not the legislation harmonizes with the federal constitution. We already have recited that criminal proceedings have been instituted. There exists the threat of contempt citations under the state court injunction. Since the question is so clearly free of doubt, the Alaskan courts should, in our judgment, be immediately relieved of additional burdens in connection with the problem, and the plaintiffs, also, should not be required unnecessarily to undergo the vexations and expense of different proceedings in the state courts, which, in the end, would have served no useful purpose.

The enforcement of the Superior Court's preliminary injunction in Cause No. 67-2024E, Superior Court for the State of Alaska, Third Judicial District, entered on March 8, 1968, is permanently enjoined.

All officers, agents, or employees of the State of Alaska are permanently enjoined from enforcing A.S. § 23.40.045 to 23.40.060, and the regulations promulgated thereunder, or from initiating or prosecuting any proceeding under purported authority of the same.

This opinion may constitute findings of fact and conclusions of law as provided by Rule 52, Federal Rules of Civil Procedure. Plaintiffs' counsel may prepare an appropriate form of judgment.

Dated at Anchorage Alaska, this 1st day of August, 1968.

/s/ Walter Ely
United States Circuit Judge

/s/ Raymond E. Plummer

/s/ James A. von der Heydt
United States District Judges

Appendix C

In the Superior Court for the State of Alaska

Third Judicial District

State of Alaska, Plaintiff, vs. International Union of Operating Engineers, Hoist, Shovel and Dredgemen, et al., *Defendants.*	No. 67-2024 E

MEMORANDUM DECISION

Appearances:

For Petitioner

Honorable Edgar Paul Boyko
Attorney General
Miss Kay Richie, Assistant
Attorney General

For Respondents

Joe P. Josephson, Esq.
Anchorage, Alaska
J. Duane Vance, Esq.
Seattle, Washington

LEWIS, J.:

On October 13, 1967, Plaintiff, State of Alaska filed in this Court a complaint for injunction and for other relief, under authority of AS 23.05.060 (Empowering

the Department of the State of Alaska to enforce all State Labor Laws; AS 23.05.130 (providing that the Department shall aid and assist resident workers with respect to rightful preference to employment in Alaska industry); AS 23.05.210 (Empowering the Attorney General to prosecute civil cases arising under state labor law referred to him by the Department of Labor) and AS 44.23.020 (b) (7) (empowering the Attorney General to represent the State in litigation to which the State is a party.)

The complaint alleges that defendants have intentionally refused to comply with AS 23.40.050 (the so-called "Local Autonomy Act") and an emergency regulation promulgated thereunder, which, in essence, provides that national or international labor organizations having one hundred or more members in good standing residing or working in Alaska must have one or more local organizations in the State. (AS 23.40.060 provides for a fine of not less than $1,000.00 nor more than $10,000.00 for each violation of the previous section.)

The complaint states that a large number of Alaska residents, members of defendant international and local labor organizations, but constituting a minority of the membership of Local 302, (which is based in Seattle), have been improperly discriminated against and have been deprived of employment by the dispatch of non-resident members to Alaska jobs. The complaint alleges that the said Alaska residents and union members, and their families and the communities in which they reside are suffering economic hard-

ship and that the State is required to provide them with employment compensation and other welfare benefits which would be unnecessary but for the conduct of defendants. In addition the State alleges that the incomes of the said Alaska resident union members are lost to the people of the State because of the non-employment of the said Alaska resident union members. The complaint alleges that, by dispatch of non-resident workers to the job sites, the expense of such work is increased for Alaska employers and, hence, Alaska consumers generally, because the employers are required to pay travel expenses and wages for travel time from residence to the place of work. The complaint alleges that such conduct on the part of defendants constitutes an enjoinable public nuisance, and that no speedy and adequate remedy at law exists to redress the injury to the public.

Plaintiff asks that defendants be enjoined from conducting business or performing the functions of a labor organization within the State of Alaska until compliance shall have been had with AS 23.40.050 and the emergency regulation promulgated thereunder and directing defendants to charter, establish and organize a bona fide autonomous local organization in the State of Alaska.

On December 18, 1967 defendants filed a motion to dismiss on the grounds that AS 23.40.050 and AS 23.40.060 violate the United States Constitution in that they deprive members of Local 302, who are non-residents of the State of Alaska, of the privileges and immunities of citizens of the several states in violation

of Article IV, Sec. 2. United States Constitution; deprive defendants, and the individuals they represent of rights existing under the laws of the United States, in violation of the supremacy clause of the Constitution of the United States Article VI (second clause); constitutes an unreasonable burden upon interstate commerce; in violation of Article I Sec. 8, United States Constitution impairing the obligation of contract (Art. I Sec. 10); or an attempted regulation by the state of the internal affairs of an unincorporated association, and hence beyond the police power of a state; or unduly vague and uncertain in violation of Fourteenth Amendment Sec. 1, United States Constitution and are an impairment of the constitutional right of assembly under First Amendment of the Constitution of the United States. The individual defendants move separately to dismiss in that the Alaska Statutes purport to apply only to national and international unions and not to local unions or individuals.

Alternatively, defendants move to strike the allegations in paragraph 4 of the complaint respecting "discrimination with respect to holding office" "discrimination with respect to employment dispatch and other functions of defendant Local, on the ground that Labor Management Relations Act of 1947, as amended (29 USC 151, et seq.), particularly 158 and 160 and the Labor Management Reporting and Disclosure Act of 1959 (29 USC 401 et seq.) provide remedies for redress of such complaints." Defendants moved to strike the allegations of para. 5 of the complaint on the basis that relief is afforded by the

L M R A through the National Labor Relations Board, or, if the alleged discrimination is a violation of the agreement between the Alaska chapter of the Associated General Contractors, private actions for breach of contract. Similarly, defendants moved to strike paragraphs X and XI on the same grounds.

"Plaintiff's Motion for Preliminary Injunction"

On January 11, 1968 the State moved for a preliminary injunction restraining defendants, their officers, agents, employees and any person in active participation or concert with them from dispatching members for employment, from operating a hiring hall or engaging in any other activity of a labor organization within the State of Alaska which (a) unfairly discriminates against any member of defendant Local 302 or (b) violates his right to seniority preference in employment under existing labor-management contracts or (c) grants a preference, not based on seniority right, to non-Alaska resident members of Local 302 or (d) violates any affirmative requirement of law, regulation of the State of Alaska or any of its regulatory agencies of competent jurisdiction. The motion was supported by the affidavit of the Commissioner of Labor, affidavits of individuals, a copy of the official report of a Special Senate Committee of the Alaska Legislature investigating local autonomy, and a Petition for Redress of grievances directed to the Governor of the State, signed by resident members of Local 302.

On February 16, plaintiff's motion for preliminary injunction and defendant's motion to dismiss were argued before the Court, the parties already having filed extensive memoranda in support of their respective positions. Following argument, the plaintiff was given 10 days and defendant was given to the 4th of March to file, respectively, answering memoranda on the defendant's motion to dismiss and defendant's reply. The motion for preliminary injunction was taken under advisement. The motion to dismiss will be taken under advisement when memoranda have been filed.

I.

Preliminary Injunction

As defendants correctly point out in their second supplemental memorandum filed February 16, 1968 (p. 1.) a Court should not issue a preliminary injunction "where there is a dispute of fact or as to the legal rights of the parties". *Alaska Sales & Service v. Rutledge*, 15 Alaska 433 (DC Alaska 1955). As the Court there noted "the power of the Court to issue such an injunction must be exercised sparingly and cautiously and only after full conviction on the part of the Court of its urgent necessity, and upon sufficient proof of conditions showing such irreparable injury which cannot adequately be compensated by damages at law . . ."

Although defendants denied that, as a question of fact, the wrongs complained of in the complaint and in the motion for preliminary injunction exist, de-

fendants, in argument assumed, *arguendo,* that certain portions of the State charges are true. In argument, defendant expressed shock that the State, through the Attorney General conceded that there were constitutional questions with regard to the Alaska Local Autonomy Law. However, the very existence of those constitutional questions invites this Court to give such constitutional questions its attention and to resolve them. Certainly, if the parties consider that such questions have not been answered with proper finality by this Court, the avenues of appellate procedure are open to them.

As I see it, the questions before this Court are twofold:

1. Has jurisdiction of the matters here sought to be litigated been preempted by the Labor Management Relations Act and the Labor Management Reporting and Disclosure Act, supra, pursuant to the Supremacy Clause of the U.S. Constitution (Art. VI)?
2. Does the State of Alaska have such interest in the subject of this litigation, and in the result sought to be achieved, to enable it to maintain this action and motion for preliminary injunction?

Since, as stated, the question must first be decided whether the subject matter of this litigation is within this Court's competence, that matter first be disposed of.

The question of the power remaining in the respective states, following enactment of the Labor

Management Relations Act of 1947, has been considered extensively by the United States Supreme Court, and by lesser courts, Federal and State.

Admittedly, the residual power of regulation of labor-management relations has been construed narrowly in these decisions. Action on the part of states which are construed as coercive and therefore forbidden under the Act to employers and unions, in respect of burdens of making charges, has very recently been construed by the U.S. Supreme Court as likewise prohibited to the states. Thus, e.g. in *Nash v. Florida Industrial Commission et al.*, 36 L.W. 4046 (Dec. 5, 1967) the Court held that the supremacy clause and the National Labor Relations Act prohibit the State of Florida, through its Unemployment Compensation Commission, to deny such compensation to a person who had filed a charge of unfair labor practice against her employer with the N.L.R.B. on the basis that the pendency of such charge constituted a "labor dispute". Florida law provided that a person was disqualified for unemployment benefits when his unemployment is due to a labor dispute. The test the Court applied in Nash, as in *Hill v. Florida* 325 US 538 (1945) is whether the local regulation stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . ."

In a case by case evolution the United States Supreme Court has continued to examine the scope of the intendment by Congress to control labor-management problems under a national policy. The Supreme Court, which earlier followed a rather doctrinaire

approach to the problem, and considered the preemption of the field rather complete, created new, unanticipated tensions in Federal-State relationships, causing the Court to recognize that Congress may not have acted with omniscience, anticipating every problem that might arise in respect of matters affecting commerce between the states in the generic sense, but in fact only peripherally, and that Congress did not intend such preemption to be absolute.

Thus, in *International Association of Machinists v. Gonzales* 356 US 617, 2 L Ed 1018 (1958) the Court recognized a right by a union member claiming to have been expelled from membership in violation of his rights under the union constitution and by-laws to sue in a state court (Calif.) for re-instatement and for damages, on a claim of illegal expulsion. There, the union petitioner *admitted* that the state had equity jurisdiction to order re-instatement but challenged the jurisdiction of the state court to award damages in breach of contract. Justice Frankfurter reasoned that the mere coincidence of some authority of the National Labor Relations Board, to award back pay to the respondent did not afford him a complete remedy and that the doctrine of preemption would not apply for that reason. "Although if the Union's conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered".

Similarly, it has been held that Sec. 301 of the Labor Management Relations Act, authorizing, in subsection (a), actions for violation of contracts between employers and labor organizations to be brought in Federal Court, does not indicate a preemption to the Federal Courts of jurisdiction in this area of litigation. *Local Teamsters 174 etc. vs Lucas Flower Co.* 369 US 95, 7 L Ed 2d 593 (1962). State courts have concurrent jurisdiction therein. *McCarroll vs Los Angeles County District Council of Carpenters* 315 P 2d 322 (Calif. 1957) cert. denied. 355 US 932 2 L Ed 2d. 415. *General Building Contractors Association vs Local 542,* 87 A 2d 250 (Penna. 1952), *Lion Oil Co. vs Marsh,* 249 SW 2d 569 (Ark. 1952).

In 1954 the Supreme Court held in *United Construction Workers vs Laburnum Construction Corp.* 347 US 656, 98 L Ed 1025 that the Virginia State courts had jurisdiction over an action by an employer against certain unions for damages for loss of profits where defendants forced abandonment of certain projects by intimidation of plaintiff's officers and employees with violence during union organization activities. The Court noted that, while such conduct violated Sec. 8 (b) (1) (29 USC 158 (b) (1)), "Congress has neither provided nor suggested any substitute for the traditional state courts procedure for collecting damages for injuries caused by tortious conduct". The Court had, shortly before held in *Garner vs Teamsters* 346 US 485, 98 L Ed. 228 (1953) that an employer may not maintain an injunction action against organizational picketing because the National Labor Relations Board, under Sec. 8 (b) (2), NLRA

had power to entertain the employer's grievance and to bring its own action for injunction against the union in Federal court to protect the employer.

In 1957 the Supreme Court held that an Arkansas equity court possessed the power to enjoin strikers and union representatives in concert with them from threatening violence and intimidating employees at an Arkansas plant and this was not within the preempted domain of the National Labor Relations Board. *Youngdahl vs Rainfair* 355 US 131 2 L Ed. 2d 151 (1957). At the same time the Court held in *Youngdahl* that peaceful picketing was not within the province of the local court.

While *San Diego Building Trades Council vs Garmon* 359 US 236 3 L Ed. 2d 775 (1959) fails to provide turn-key criteria for determining Federal-State jurisdictional issues, the separate opinion of Justice Harlan, in which Justices Clark, Whittaker and Stewart concur, states valuable guidelines for examination in similar cases. The opinion states (3 L Ed 2d 786)

> "The threshold question in every labor preemption case is whether the conduct with respect to which a state has sought to act is, or may fairly be regarded as, Federally protected activity. Because conflict is the touchstone of preemption, such activity is obviously beyond the reach of all state power".

The concurring Justices noted the similarity of principles in *Laburnum*[1] and *International Union,*

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[1] *United Construction Workers vs Laburnum Construction Corp.* 347 US 656, 1954.

United Automobile etc. Workers vs Russell 356 US 634 2 L Ed 2d 1030 in which the motivating principle of the court in sustaining the jurisdiction of the state court was that union conduct which is Federally protected ousts the state courts of jurisdiction whereas, Union conduct which is Federally prohibited may still permit state courts to assume jurisdiction, including relief by way of injunction. (Garmon 3 L Ed 2d 786) Garmon 3 L Ed 2d 784.

Turning to the most recent Alaska pronouncement on the issue generally, the Alaska Supreme Court held in *Stites vs Local 367* 430 P 2d 153 (Alaska 1967) that Federal law had preempted the state's jurisdiction in a suit by a member of a local union claiming discrimination in dispatching to jobs by the Union. The Court, citing *Garmon* supra (3 L Ed 2d 775) held that it was reasonably arguable" that the matter comes within the jurisdiction of the National Labor Relations Board and that "*in the absence of an overriding state interest* such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protection of Sec. 7 or the prohibition of Sec. 8 of the National Labor Relations Act". (italics supplied)

In a dissent, Justice Rabinowitz suggested strongly that decision in the case should have been deferred so that counsel might submit additional briefs on the impact of *Vaca vs Sipes* 386 US 171, 17 L Ed 2d 842 (1967).

The *Vaca* decision, written by Associate Justice White, holds that not only a wrongfully expelled union member (Gonzales) but also a discharged union member employee has the right to have his claim against the Union for "arbitrary" refusal to prosecute a grievance with the employer to arbitration to a state court (Missouri) for redress. As he states in the decision;

> "A primary justification for the preemption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in *Steele* (vs Louisville and N R Co., 323 US 192 89 L Ed. 173) and its progeny suits alleging breach of the duty remained judicially cognizable long after the N L R B was given unfair labor practice jurisdiction over union activities by the L M R A****** This court recognized in *Steele* that the Congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 US 198, 199, 89 L Ed 180, 181.
>
> "Since that land-mark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of Federal labor law. Were we to hold,

as petitioners and the government urge, that the courts are foreclosed by the N L R B's *Miranda Fuel* decision from this traditional supervisory jurisdiction; the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Council has un-reviewable discretion to refuse to institute an unfair labor practice complaint. See *United Electrical Contractors Assoc. vs. Ordman* 366 F 2d 776, cert. denied 385 US 1026. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine".

"For these reasons, we cannot assume from the N L R B's tardy assumption of jurisdiction in these cases that Congress, when it enacted L M R A Sec. 8 (b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative".

Section 8 (b)[1] of the L M R A, defining unfair labor practices by labor organizations and their agents, does not directly proscribe the activity complained of in plaintiff's motion for a preliminary injunction, although discriminatory conduct toward union members by union officers has been held to violate 8 (b) (2) and 8 (a) (3) cognizable by the N L R B even though encouragement or discouragement of union

[1] 29 USC 158 (b)

membership was not the direct issue. *N.L.R.B. vs A & B vs Zinmon Inc.* 372 F 2d 444 (C.A. N.Y. 1967).

The administrative remedy is however not sufficient to afford the relief here sought by plaintiff. While the Board has power to seek the aid of a court enjoining unfair labor practices (sec. 101 (j)[1] and in enforcing its orders for back pay and reinstatement (101 (c)), there is no compulsion upon the Board to act in respect of any particular charge of violation, or accumulation of such charges, as here. The General Council has the discretion to file or not file a formal complaint, to set Board proceedings in motion.

In 1967 the Alaska Legislature held hearings on SB 38, the bill which became the Local Autonomy Law, against a background of considerable public outcry for such legislation. The Legislature enacted the bill as Ch. 8, SLA 1967. Passage of this bill followed defeat of a similar bill introduced in the previous session of the Alaska Legislature. This legislation arose out of complaints that unions not maintaining locals in Alaska were not giving favorable treatment to Alaska residents, and were discriminating on dispatch from out-of-work lists in favor of members not resident in Alaska.

Attached to the affidavit of J. Duane Vance, one of defendant's counsel, dated February 2, 1967, in the Judiciary Committee Report on Senate Bill 38, in which Committee Chairman Fink states "The bill does interfere with the internal affairs of a union but may

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[1]29 USC 160 (j)

represent the desires of a majority of the Alaskan members and Alaskans in general".

Plaintiff has supported its motion with numerous exhibits, A through G, supplemented since the motion was first filed by Exhibit H, and an affidavit of Thomas J. Moore, Commissioner, Department of Labor, State of Alaska dated February 7, 1968, to which are attached copies of documents from official files of the Department. Much of this material has to do with investigations of complaints by the Department of Labor during 1965, under the administration of Governor William A. Egan, at the Governor's request. As a result of this investigation, then Commissioner Johnson in a draft report determined that contractors on the Seward Dock construction with 72 employees had about 25% local hire, and that out-of-town men had been dispatched to the contractor while local members of defendant union were unemployed, with an indication that the unemployed members were recalcitrant with respect to signing a petition against local autonomy circulated by officials of Local 302. Other individuals who reported difficulty in being referred to jobs, or in keeping jobs they had obtained when Local 302 was the bargaining agent for the employees, reported similar experience with respect to their refusal to sign the petition circulated by the union officials, or their activity in favor of local autonomy. The Commissioner considered the evidence not conclusive enough to support a recommendation to the N L R B for action. Attached to the report were statements by members of Local 302 who had been connected in some

way with the local autonomy movement, and had colloquies with the officials of Local 302 respecting the treatment they should anticipate for such participation. Their employment records were consistent with these conversations. One employer (M-B Construction) claimed to have only Alaska residents on job. The investigation appears to have had a salutory effect. Mr. Nagel, the investigator, reported in a memorandum to the Commissioner on July 2, 1965: "Of interest is the fact that two days after an investigation was conducted on the Kenai Peninsula, the preponderance of unemployed 302 operators were dispatched and are presently employed".

Exhibit A is an affidavit of Leo A. Phillips, a member of Local 302, and of the Alaska Operating Engineers Committee for Local Autonomy (hereinafter referred to as "Local Autonomy Committee"). The affidavit furnished factual information concerning existing collective bargaining agreements and operation of the union hiring hall for out-of-work members. The affidavit states that the lack of a locally chartered organization, with majority control outside of Alaska, has resulted in discrimination on jobs against Alaska residents, with resulting deprivation to their families, the communities in which they reside, the unemployment and other welfare programs of the State, inability of resident members to obtain sufficient work experience to establish seniority positions and consequent economic loss to the State.

Exhibit B, an affidavit by Labor Commissioner Moore, reciting that as a result of numerous com-

plaints received by his office from individuals purporting to be members of Local 302 alleging that Local 302 discriminated against such individuals by dispatching non-residents to jobs in the State, and that, as a result of these complaints, some of which were under oath before the Alaska State Senate Investigation Committee at Anchorage, (July 6, 1967), the Department of Labor promulgated emergency regulations, Title 8, Labor, Division 2, Industrial Relation Section 400—402 inclusive, requiring registration of locally chartered unions with the Commissioner of Labor. The affidavit recites that no union, including defendant International, complied with the regulation.

Exhibit C is a report of the Special Senate Committee to investigate Local Autonomy, which met at Anchorage on July 6, 1967, at which sworn testimony was taken from numerous witnesses. The Committee based on this testimony made findings that "there has been widespread employment discrimination against Alaskan residents by the officers and management of Local 302 . . . and particularly against Alaskan resident members of the Union who are known to be in favor of local autonomy," and that "a substantial number of Alaskan residents, members of that union, who are fully qualified to be employed as operating engineers are presently unemployed, while out of state members are presently of the local or other locals of the same international union are dispatched to work on construction jobs in this state without any regard to seniority."

Exhibit F (there were no exhibits "D" or "E") is an affidavit of Max McCurdy (reportedly cate-

gorized by defendant Local as a "trouble maker" see attachment to Thomas J. Moore affidavit of February 7, entitled "Max McCurdy, SSA #527-07-4689"). Mr. McCurdy "reports termination of his employment with Marathon Oil Company, not a signatory to the labor-management agreement between defendant local and the Alaska General Contractors of America, Inc., pursuant to which agreement the defendant Local's hiring hall is operated, and that such termination was brought about by defendants." Mr. McCurdy alleges that defendant Local and its officers were motivated in procuring such discharge by his, McCurdy's, activities on behalf of the Local Autonomy Committee.

Exhibit G is a petition to the Governor and the State Department heads and legislative leaders, wherein the signatories complain of discriminatory hiring practices against them, "preferential treatment in favor of non-Alaskans, mismanagement of local union affairs and individual persecution of those members who attempted to redress their grievances." The petitioners seek "public and private pressure" in having an autonomous Local Union organized and in instituting fair and equitable hiring and dispatching practices. The petitioners ask that the relief sought be instituted at once because of the period of construction season and the economic hardship which would otherwise result.

Defendants, in opposition to these assertions, rely principally on the affidavit of Russell T. Conlon, business manager of Local 302. Mr. Conlon's affidavit

refers to the NLRB certification of Local 302 as bargaining representative for the employees of member contractors of the Alaska Chapter of the Associated General Contractors, and the maintenance, under the basic labor-management contract with said Association, of a "non-discriminatory hiring hall through which the employers are required to requisition employees." Mr. Conlon's affidavit asserts that compliance with the Alaska Local Autonomy Law would require abandonment of representation of employees who are members of Local 302, and the loss of substantial amounts of accrued pension rights and health and welfare benefits to such employees. The affidavit makes reference to a "small group of members of Local 302" seeking to establish a local and of their formation of a Local Autonomy Committee. Five of these individuals filed charges against Local 302 with the NLRB, alleging discrimination because of activity on behalf of the Local Autonomy Committee. (Exhibits 68-71 incl.) As indicated therein, the charges of four of these individuals were withdrawn with the approval of the Acting Regional Director of the National Labor Relations Board, without prejudice in reported actions on October 6, 1967. The reasons for withdrawal are not clear. Mr. Conlon's affidavit states that the charges by Martin B. Fanelli were "without merit and were dismissed" and that other charges were withdrawn. Why these charges were withdrawn is not demonstrated by the record, but there is no indication in the record that the charges were considered on their merits. Finally, Mr. Conlon asserts that the relief sought (i.e. preliminary in-

junction) will cause Local 302 and the employees represented by it, to lose their "constitutional rights to do business in . . . Alaska; to administer their contract; to freely assemble and discuss, control and decide upon litigation to determine their rights, to conduct elections and to vote therein without coercion, all in violation of . . . federal constitutional rights."

II.

Findings of Fact

The relief sought by the preliminary injunction (see pp 4 and 5 hereof), will obviously not accomplish the evils foreseen by Mr. Conlon. The State asks merely that defendants conduct themselves in such manner in the State of Alaska that the discriminatory practices complained of will not take place until the matter can be tried on its merits.

I find that the State has, by the conduct referred to above (referring to the State's exhibits) made at least a prima facie showing that defendants have systematically discriminated against Alaskan residents who are qualified members of Local 302, and have favored non-resident members of said Local in referring members to jobs. These practices, I find, are harmful, not only to the members against whom the discrimination is practiced, but to the people of the State of Alaska, in requiring the outlay of public funds for unemployment and welfare relief for such members and their families, and in depriving such members of earnings which would otherwise flow into

the economy of the State and thereby benefit the citizens of the State generally.

For purposes of preliminary injunction the factual existence of such interest on the part of the State has been sufficiently established by affidavits and exhibits filed by the State. *Hoffritz v. U.S.* 240 F 2d 109 (C.A. 9, 1965).

I find that prohibiting such practices will not interfere with the lawful exercise by the parties thereto of existing labor-management contracts to which Local 302 is signatory, nor with the rights of any member of said local under pension and health and welfare benefit plans.

III.

Conclusions of Law

I find, as a matter of law, that prohibition by this Court of the discriminatory practices complained of is a proper exercise of this Court's jurisdiction pursuant to AS 22.10.020 and Civil Rule 65, and that the State for the foregoing reasons, has sufficient interest in the subject matter, and in the relief sought, to maintain this action in the promotion of the general welfare *In re Debbs Petitioner* 158 US 564, 39 L Ed. 1092 (1895).

I find that the relief sought is not within an area which has arguably been pre-empted under the Supremacy Clause of the United States Constitution, but is, rather, in the nature of requiring that defendants provide the citizens of Alaska who are members of defendant Local 302 with the fair representation

to which they, and the State and its citizens derivatively, are entitled. *International Assoc. of Machinists v. Gonzales,* supra, p. 8. The practices complained of are as harmful to the welfare of the State as violence at an individual plant, which is clearly enjoinable in a State Court *Youngdahl v. Rainfair* supra, p. 10. I find no conflict with federal authority—the "touchstone of preemption." (*San Diego Building Trades Council v. Garmon,* supra, p. 11.)

The overriding State interest, which was wanting in *Stites v. Local 367,* supra, p. 11, is here manifested.

Nor does the relief sought, with the possible exception of item (d) of the Motion for Preliminary Injunction (hereinafter discussed) depart from the fair representation concept reiterated in *Vaca v. Sipes,* supra, p. 12. Such relief will require only that defendants do only what they are required by agreement and by national law and policy to do—represent fairly and without discrimination those whom they are empowered by such agreements, law and policy to represent. This does not mean Alaska residents must be favored—merely that they may not be discriminated against. There is no interference sought with defendants' rights of free speech, assembly, nor of the obligation of any contract. I see no abridgment, even tangentially, of any constitutionally protected right.

Item (d) of the Motion for Preliminary Injunction seeks an order that defendants be enjoined, *pendente lite,* from practices that violate "any affirmative requirement of law or regulation of the State of

Alaska or any of its regulatory agencies of competent jurisdiction." Presumably, plaintiff has reference to the Local Autonomy Law, and regulations promulgated in pursuance thereof, I find no compelling necessity existing at this time to require, by way of preliminary injunction, that defendants establish a local, *pendente lite*. The State has an adequate remedy at law, through criminal sanction which is currently being pursued. (*State v. Int'l Union of Operating Engineers,* et al No. 67-442 Cr.)

Except as above stated, I find that plaintiff has no complete and adequate remedy at law.

Order

Accordingly, it is hereby ordered that defendants, and each of them, their officers, agents, employees and any person in active participation or concert with them, during pendancy of this action, or until further order of the Court, are hereby restrained, prohibited and enjoined from engaging in dispatching members or others for employment and from maintaining or operating a hiring hall or engaging in any other related business or activity within the State of Alaska which unfairly discriminates against any member of defendant Local 302 or violates his right to seniority preference in employment under existing labor-management contracts, or grants a preference, not based on seniority right, to non-Alaska resident members of defendant Local 302.

Defendants, their officers, agents, employees and any persons in active participation with them are

further restrained, prohibited and enjoined from interfering with duly-designated employees of the Alaska Department of Law or the Alaska Department of Labor in conducing reasonable investigations for the purpose of assuring compliance with this order.

Defendent's Motion to Dismiss is denied. Defendant's alternative motion to strike portions of the complaint is reserved for further advisement and decision.

Done at Anchorage, Alaska, this eighth day of March, 1968.

Eben H. Lewis,
Superior Court Judge.

Appendix D

LAWS OF ALASKA

1967

Chapter No.
8

AN ACT

Making it unlawful not to have local labor organizations in this state; and providing for a penalty.

Be It Enacted By The Legislature Of The State Of Alaska:

*Section 1, AS 23.40 is amended by adding new sections to read:

Sec. 23.40.050. Local Labor Organizations. It shall be unlawful for any national or international labor organization having 100 or more members in good standing who reside or work in Alaska not to have at all times one or more duly chartered and established local organizations in this state.

Sec. 23.40.060. Penalty. Any national or international labor organization which violates sec. 50 of this chapter, upon conviction, is punishable by a fine of not less than $1,000 or more than $10,000 for each offense.

Approved by Governor: February 22, 1967
Actual effective date: May 23, 1967

Appendix E

LAWS OF ALASKA

1968

Chapter No.
231

HCSSB 347 am

AN ACT

Relating to labor organizations; and providing for an effective date.

Be It Enacted By The Legislature Of The State Of Alaska:

*Section 1. AS 23.40 is amended by adding a new section to read:

Sec. 23.40.045. Records. (a) A person who or labor organization which operates a hiring hall or furnishes labor exclusively under a labor-management contract and which does not have a chartered local in this state shall maintain accurate hiring, dispatching and membership records in accordance with regulations promulgated by the commissioner.

(b) The records required under (a) of this section shall be open to inspection by the commissioner or his authorized representative.

*Sec. 2. AS 23.40 is amended by adding new sections to read:

Sec. 23.40.052. Interference In Chartering Prohibited. It is unlawful for an officer of a national, international or local labor organization, having 100 or more members in good standing

who reside or work in Alaska to wilfully discourage or impede or attempt to discourage or impede, by means of coercion or other unlawful act, the chartering and establishment of a local organization in this state in accordance with sec. 50 of this chapter. However, this section does not apply to a labor organization which has a chartered local in this state.

Sec. 23.40.054. Civil Enforcement. In addition to the criminal penalties provided for in this chapter, the attorney general may enforce the provisions of this chapter by appropriate civil proceedings, including injunctive relief, against threatened, repeated or continuous violations of this chapter or regulations adopted under it. These proceedings may be brought against an international, national or local labor organization or an officer of an international, national or local labor organization.

Sec. 23.40.056. Exemptions. (a) The commissioner may grant an exemption from the provisions of secs. 45-60 of this chapter to a labor organization which

(1) has so few members who reside in Alaska that chartering and operating a local would work a financial hardship on these members;

(2) maintains local-hire preference provisions in all of its labor-management agreements in the state; or

(3) maintains provisions in its constitution and bylaws for the election, by and from among the members of the organization who reside in Alaska, of a business agent or other person in charge of hiring hall in Alaska, and of dispatch and grievance procedures.

(b) Exemptions granted under this section shall be applied for and issued on an annual basis in accordance with regulations adopted by the department.

*Sec. 3. AS 23.40.060 is repealed and re-enacted to read:

Sec. 23.40.060. Penalties. (a) A national or international labor organization which violates sec. 50 of this chapter, upon conviction, is punishable by a fine of not less than $1,000 or more than $10,000.

(b) An officer of a national, international or local labor organization who violates sec. 52 of this chapter is punishable, upon conviction, by a fine of not more than $1,000 or by imprisonment of not more than one year, or by both.

(c) Failure to maintain accurate records in accordance with sec. 45(a) of this chapter and the regulations promulgated under it is a misdemeanor punishable by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both.

(d) Wilful failure to comply with sec. 45(b) of this chapter is a misdemeanor punishable by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both.

*Sec. 4. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

Approved by Governor: May 8, 1968

Actual effective date: May 9, 1968

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No. 734

In the Supreme Court of the United States

OCTOBER TERM, 1968

STATE OF ALASKA, ET AL., APPELLANTS

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO, ET AL., AND NATIONAL LABOR RELATIONS BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the National Labor Relations Board moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App.)[1] which: (1)

[1] The proceedings before the three-judge district court involved two cases—J–18–67 and J–19–67—which were consolidated for purposes of hearing and decision, but the court entered separate judgments in each case. See pp. 7–8, *infra*. It is not clear whether the appellants are appealing from the judgments in both cases or only from that in J–18–67. The judg-

declared certain Alaska statutes unconstitutional under the supremacy clause of the Constitution because they invade an area pre-empted by the National Labor Relations Act; (2) enjoined the enforcement of those statutes; and (3) enjoined the enforcement of an injunction issued by the Superior Court of Alaska (J.S. App. 41–42) because it similarly intruded into an area pre-empted by the National Labor Relations Act.

A. THE BACKGROUND FACTS

Local 302 of the International Union of Operating Engineers AFL-CIO has its principal office in Seattle, Washington, but maintains other offices in Anchorage, Juneau, and Fairbanks, Alaska (F. 4).[2] At each of these Alaskan offices the Union operates a hiring hall pursuant to collective bargaining agreements it has with Alaskan employers (see F. Exh. C). One of these agreements (F. Exh. C) is with the Alaska Chapter of the Associated General Contractors of America ("AGC"), whose employees are represented by the Union pursuant to a certification issued by the National Labor Relations Board (F. 3).

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ment reproduced at J.S. App. 1–3 contains the caption of J–19–67, but the provisions of the judgment entered in J–18–67 (but cf. J.S. 21). Since the Board is a party only in J–18–67, this motion to affirm is confined to the judgment in that case.

[2] "F." refers to the stipulation of facts signed by all parties in J–18–67, and "Exh.", to the accompanying exhibits (all exhibits except "O" referred to in the stipulation of facts were introduced by the plaintiffs; exhibit "O" was put in by the State of Alaska). F–2 refers to the stipulation of facts signed by all parties in J–19–67. References to affidavits filed by the parties include the docket number.

The Union is also the certified representative of employees of more than 50 other employers who are parties to similar agreements (F. 3).

For the last several years there has been a dispute between the Union and certain of its members in the Anchorage area concerning the chartering by the International of a separate local in Alaska (see Affidavit of Russell T. Conlon, Doc. No. 7, pp. 7–8). Some of these Alaska members of the Union have complained to the Governor and the Legislature that the Union has discriminated against Alaska residents in hiring and job dispatching (F. 4). Several of the complainants contended that the Union particularly discriminated against them, with respect to job opportunities, because of their vocal position in favor of "local autonomy" (J.S. App. 33–36).

Five Union members filed unfair labor practice charges with the Board asserting that this alleged discrimination violated Section 8(b) of the National Labor Relations Act (F. Exh. M, and see Affidavit of Russell T. Conlon, *supra*, pp. 7–8). Based on one of these charges, filed by Martin B. Fanelli on October 17, 1966, the General Counsel of the Board issued an unfair labor practice complaint against the Union (F. Exh. M, p. 4). After a hearing, a Trial Examiner of the Board found that there had been no discrimination and recommended that the complaint be dismissed (F. 1; Exh. M, p. 11). No exceptions to the Trial Examiner's decision were filed with the Board. Other unfair labor practice charges filed by members proposing "local autonomy" were withdrawn (J.S. App.

36, and see Affidavits of Russell T. Conlon, *supra*, pp. 7–8).

In the Spring of 1967, the Legislature of the State of Alaska passed a statute ("the Local Autonomy Act") requiring international or national unions with more than 100 Alaskan resident members to charter an Alaskan local (J.S. App. 43).[3] The International Union of Operating Engineers refused to comply with this statute (F. 5). On September 20, 1967, the Governor issued Administrative Order No. 5 which directed that all future contracts with the State include a provision whereby the contractor would agree not to enter a contract with, nor accept a dispatch from, a union not in compliance with "the state local autonomy law and all state regulations made pursuant thereto" (F. 2, Exh. D). On October 18, 1967, the AGC notified the Union that all future contracts with the State would include the contractual provisions required by Administrative Order No. 5, "whether or not these provisions are consistent with the hiring provisions of existing labor contract [between the Union and AGC]" (F. 2, Exh. E).

Meanwhile, on October 12, 1967, Alaska instituted criminal proceedings under the Local Autonomy Act against the International, its Local 302, and individual agents of Local 302 (F. 5; Exhs. E and F). On the same day, the State brought a civil action in the State Court for an injunction restraining the International, Local 302, and certain of its agents from "engaging in any other business, activities or functions of a labor organization within the State of

[3] The Act became effective on May 23, 1967.

Alaska" until they comply with the Local Autonomy Act (F. Exh. 41, p. 7).[4] The State also sought an order directing the defendants to charter "a *bona fide* autonomous Local union" and promptly "to hold such elections of officers, establish by-laws and turn over funds, records, facilities and premises * * * as may be necessary to enable such local organization to function properly" (*ibid.*).

On January 11, 1968, the State sought a preliminary injunction in the civil action (J.S. App. 22). On March 8, 1968, the State court, finding that the Union and the other defendants had "systematically discriminated against Alaskan residents who are qualified members of Local 302, and have favored non-resident members of said Local in referring members to jobs" (J.S. App. 38),[5] entered a preliminary injunction restraining the defendants from operating a hiring hall within the State of Alaska "which unfairly discriminates against any member of defendant Local 302 or violates his right to seniority preference in employment under existing labor-management contracts, or grants a preference, not based on seniority rights to non-Alaska resident members of defendant Local 302" (J.S. App. 41).

[4] The State subsequently amended its complaint to delete this matter.

[5] The State court rejected the defendants' contention that the subject matter was within the exclusive jurisdiction of the National Labor Relations Board, on the ground that the relief sought was "in the nature of requiring that defendants provide the citizens of Alaska who are members of defendant Local 302 with the fair representation to which they, and the State and its citizens derivatively, are entitled" (J.S. App. 39–40).

Finally, in May of 1968, the Alaska legislature passed amendments to the Local Autonomy Act which, *inter alia,* required a union operating a hiring hall in Alaska without a local charter to keep dispatching records in accordance with regulations published by the Commissioner of Labor[6] (enforceable by criminal penalties including imprisonment); and permitted the Commissioner of Labor to provide exemptions from the Act for unions which maintain local-hire preference provisions in all of its contracts in Alaska. (J.S. App. 44–46.)

B. THE PROCEEDINGS BELOW

On October 25, 1967, the Union and several of its members filed a complaint in the federal district court for the District of Alaska (J–18–67), under 28 U.S.C. 1331 and 1337, seeking an injunction restraining State officials from enforcing the Local Autonomy Act, and a declaration that the Act was unconstitutional on several grounds, including preemption by the National Labor Relations Act. A subsequent amendment to the complaint sought similar relief with respect to the 1968 amendments to that Act, as well as an injunction against any further proceedings to enforce the Alaska State court's preliminary injunction. Pursuant to the plaintiffs' request, a three-judge district court was convened. The National Labor Relations Board intervened in the proceeding.

At the time it filed that suit (J–18–67), the Union also filed an action in the district court against AGC, pursuant to Section 301 of the Labor Management Re-

[6] The Regulations were issued on May 31, 1968 (F. 3; Exh. 2).

lations Act (J–19–67) (see n. 1, *supra*). The Union alleged that AGC's notification of intent to abide by the Governor's Administrative Order No. 5 constituted a notice of intention to breach its collective bargaining agreement and sought a declaratory judgment as to the validity of the bargaining agreement. The State of Alaska intervened in this action as a party defendant, and the Union filed a claim for relief against the State similar to that sought in J–18–67, and also moved for a three-judge court.[7]

On the basis of a stipulation of facts by the parties, the district court held that the Local Autonomy Act and its amendments invaded an area preempted by the National Labor Relations Act, and thus were invalid (J.S. 12–13). The court further held that the State court injunction was likewise invalid for the discrimination at which it was directed—"job referral discrimination to strengthen union authority—clearly is within the exclusive jurisdiction of the National Labor Relations Board" (J.S. App. 15). Accordingly, in J–18–67, the court entered an order enjoining the enforcement of the State statute and the State in-

[7] On May 3, 1968, three members of the Union, Leo A. Phillips, Alfred M. White, and William Jones, represented by separate counsel (see Docket entry 46), moved to intervene on the side of the State. Plaintiffs and the Board opposed the motion because of the likely delay, and it was denied on May 22, 1968. No appeal from the denial of the motion was taken by Phillips, White, and Jones, until counsel for the State filed an amended notice of appeal on August 26, 1968, which sought to include them as well as the State and its officials. In these circumstances, it would appear that an appeal by these individuals, which could only contest the propriety of the denial of intervention, was not timely filed under 28 U.S.C. 2101(b).

junction (J.S. App. 2–3), and, in J–19–67, it entered a judgment confirming the validity of the collective agreement between the Union and the AGC.

ARGUMENT

1. Appellants' basic challenge to the ruling of the district court is that the amended Local Autonomy Act and the State court proceedings to enforce the Act do not invade an area pre-empted by the National Labor Relations Act.[8] In *Hill* v. *Florida*, 325 U.S. 538, this Court struck down a Florida statute which required a union business agent to obtain a State license, and to file certain information with the State because the licensing requirement circumscribed "the 'full freedom' of choice which Congress said employees should possess" in the selection "of a collective bargaining representative" (325 U.S. at 541), and "interfere[d] with the collective bargaining process" (*id.* at 542). In addition, the Court found that the sanc-

[8] Appellants suggest that the convening of a three-judge court was error (J.S. 21), but do not present any support for this contention. Since the district court found that plaintiffs' direct constitutional challenges to the State statute (other than on pre-emption grounds) were substantial (J.S. 13), a three-judge court was properly convened under 28 U.S.C. 2281. *Locomotive Engineers* v. *Chicago R.I. & P.R. Company*, 382 U.S. 423, 428.

Appellants also contend (J.S. 12) that the district court improperly refused to take testimony on the nature of the Union's alleged discriminatory practices. However, the State of Alaska agreed to a stipulation of facts in both J–18–67 and J–19–67, and did not seek to present additional testimony (*supra*, p. 7). Moreover, a number of the assertions concerning discrimination by the Union and its general effect on the State, contained in appellants' Statement of the Case without supporting citation (J.S. 6–8), are not reflected in either the stipulations or the affidavits incorporated therein.

tion imposed for failure to comply with the statute—*i.e.*, an injunction barring the union from operating within the State, with the possibility of criminal punishment for contempt—also interfered with "the federally protected process of collective bargaining" (*id.* at 543).

The Alaska statute and the regulations relating thereto likewise impermissibly interfere "with the full freedom of workers to choose a bargaining agent and in the collective bargaining process" (J.S. App. 12–13). The Local Autonomy Act requires an international or national union—once it gains more than 100 members residing in Alaska—to charter an Alaska local (AS. 23.40.050; J.S. App. 43). Without an exemption,[9] such a union that continues to operate within the State of Alaska without chartering an Alaska local, is subject to criminal penalties and civil sanctions, including an injunction (AS. 23.40.054, 23.40.060; J.S. App. 45, 46).[10]

---

[9] The Commissioner of Labor is authorized to grant an exemption from the requirement to establish an Alaska local where the labor organization:

* * * * *

(2) maintains local-hire preference provisions in all its labor-management agreements in the state; or

(3) maintains provisions in its constitution and bylaws for the election, by and from among the members of the organization who reside in Alaska, of a business agent or other person in charge of hiring hall in Alaska, and of dispatch and grievance procedures. [AS. 23.40.056; J.S. App. 45.]

[10] Moreover, the union's officers are subject to criminal penalties if they attempt to discourage the formation of an Alaska local, or fail to maintain the required records (AS. 23.40.052, 23.40.060; J.S. App. 44–45, 46).

To require an international or national union to charter an Alaska local affects its ability to represent employees, and abridges the employees' freedom of choice, no less than the licensing requirement in *Hill*. An interstate local, such as Local 302, may be able to provide better representation than an Alaska local because of its greater power vis-a-vis the employers. In any event, Section 7 of the National Labor Relations Act permits the employees to select an interstate union as their representative if they wish.

Moreover, since an interstate union which does not charter an Alaska local and does not maintain the records required by the Alaska statute is subject to criminal penalties and injunction, the union cannot continue to operate in the State unless it complies with the statute.[11] Thus, here, as in *Hill*, the sanction imposed "brings about a situation inconsistent with the federally protected process of collective bargaining" (325 U.S. at 543). And, here, as in *Hill*, the State requirement has "already interfered with the collective bargaining process" (*id.* at 542), because the AGC has refused to honor its contract with Local 302 insofar as it does not comply with the Governor's Administrative Order No. 5, issued to implement the statute (*supra*, p. 4).[12]

[11] As noted (*supra*, pp. 4–5), in the civil suit in the Alaska State court, the State originally sought an injunction restraining the Union from functioning in Alaska. It later amended its complaint to seek only a mandatory injunction requiring compliance with the Local Autonomy Act.

[12] The conflict with the National Labor Relations Act is not alleviated by the exemptions, which provide that an interstate union need not charter an Alaska local if its collective bargaining agreements contain a hiring preference for Alaska residents,

Appellants contend (J.S. 12, n. 6) that the Local Autonomy Act does not interfere with employee freedom of choice because it merely requires that an Alaska local be chartered *in addition* to whatever other representative may be selected. This contention misses the point, for the National Labor Relations Act gives the employees in the bargaining unit the right to decide that they want an interstate local affiliated with an international which does not have an Alaska local as their representative.[13] Appellants also contend (J.S. 13–14) that, absent the Local Autonomy Act, Alaska workers must choose between representation by existing unions operating in the State and the

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or if it places an Alaska resident in charge of the hiring hall in Alaska and of dispatch and grievance procedures (n. 9, *supra*). Since, under federal law, the terms under which employees will be referred for hire, and those under which the hiring hall and the grievance procedure will be operated are matters for collective bargaining between the parties, a State interferes with the process of collective bargaining by mandating contract terms and other conditions which would either require or most likely result in discrimination against non-residents. Cf. *Teamsters Union* v. *Oliver*, 358 U.S. 283, 297.

Finally, the provision of the Alaska statute barring union officials from discouraging the formation of an Alaska Local (AS. 23.40.052; J.S. App. 44–45) regulates conduct which is an unfair labor practice under the National Labor Relations Act (see *infra*, p. 13), and the record requirements (AS. 23.40.045; J.S. App. 44) regulate conduct protected by Section 7 of that Act (see *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667). State regulation of such conduct is barred under *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245.

[13] The contention is also inconsistent with the State's prayer for relief in the State court suit. Paragraph XVII(1) seeks an order requiring Local 302 to turn over unspecified funds, records, facilities, and premises to a newly chartered "bona fide" local (*supra*, p. 5); this suggests the complete substitution of another local for Local 302.

rejection of "union representation altogether." But Alaskan dissidents of Local 302 or any other labor organization are free to form their own union and to petition, at an appropriate time, for elections in the various Alaskan bargaining units.[14]

2. Appellants further contend (J.S. 16–20) that the Local Autonomy Act, and especially the preliminary injunction issued by the State court, were directed only at the Union's breach of its duty of fair representation, and thus were sanctioned under *Vaca* v. *Sipes*, 386 U.S. 171. However, assuming that a State would have power to enact legislation directed at breaches of the duty of fair representation, the statute would have to be narrowly drawn so as to reach only the kind of conduct which Federal law regards as unfair representation, and its remedies would have to be a reasonable means of alleviating that particular problem. There is no indication that the State, when it enacted the Local Autonomy Act, was concerned, even in part, with implementing the federal duty of fair representation. Moreover, the remedies imposed by the statute (*e.g.*, the requirement of chartering an Alaska local) go beyond what is necessary to cure a breach of the duty of fair representation, and infringe upon rights protected by Federal law.

---

[14] *De Veau* v. *Braisted*, 363 U.S. 144 (J.S. 19), is clearly distinguishable, as the court below found (J.S. App. 11–12). There, unlike here and in *Hill*, "the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations," and it had approved "the heart of the state legislative program explicitly brought to its attention." 363 U.S. at 155.

The State court preliminary injunction stands on no firmer ground. The injunction was issued in a suit which the State brought to enforce the Local Autonomy Act. It is, therefore, doubtful whether it can be disassociated from that statute, notwithstanding the State court's attempt to predicate the injunction on breach of the duty of fair representation (J.S. App. 39–40), and its action in merely enjoining, *inter alia*, unfair discrimination (J.S. App. 41). But even if the injunction could be separated from the statute, it is still invalid because the affidavits relied on by the State court alleged that the Union had refused to refer union members to jobs because they had opposed the Union leadership on the local autonomy issue (J.S. App. 33–37). For a union to deny job opportunities to an employee-member as a reprisal for his failure to abide by, or his opposition to, union rules or policies, violates Section 8(b) (2) and (1) (A) of the National Labor Relations Act, wholly apart from any breach of the duty of fair representation.[15] Thus, State regulation of this kind of activity is barred

[15] See *National Labor Relations Board* v. *A & B Zinman, Inc.*, 372 F. 2d 444, 445 (C.A. 2), and cases there cited; *National Labor Relations Board* v. *Local 542, International Union of Operating Engineers*, 329 F. 2d 512, 514 (C.A. 3); *Lummus Company* v. *National Labor Relations Board*, 339 F. 2d 728, 731–735 (C.A.D.C.). See also *Plumbers' Union* v. *Borden*, 373 U.S. 690, 696, n. 7.

Indeed, the State court recognized that the employees had filed charges with the Board (J.S. App. 37). See *supra*, p. 3. The Board's jurisdiction is not diminished because it found that one of the charges lacked evidentiary support, and the others were withdrawn.

under the general pre-emption principle of *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236. See *Plumbers' Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701.[16]

CONCLUSION

The judgment of the district court in J–18–67 should be affirmed.

Respectfully submitted.

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DECEMBER 1968.

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[16] By specifically prohibiting the Union from granting a referral preference to non-Alaska resident members of the Union not based on seniority (J.S. App. 41), the Superior Court's order also runs afoul of *Teamsters Union* v. *Oliver*, *supra*. For the contract between the Union and the AGC requires the Union to grant dispatching preferences not based on seniority when an employer requests a "particular man" recently laid off or operating engineers with "special skills" (F. Exh. C, pp. 6–7).

Although appellants do not raise the issue, 28 U.S.C. 2283 was not a bar in this case, for the reason, *inter alia*, that the injunction against the State court decree was sought by the Board, an agency of the United States. See *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; cf. *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U.S. 501.

U.S. GOVERNMENT PRINTING OFFICE: 1968

No. 34

Supreme Court of the United States

STATE OF ALASKA
and
WALTER J. HICKEL, Governor of the State of Alaska, G. KENT EDWARDS, Attorney General of the State of Alaska, THOMAS J. MOORE, Commissioner of Labor of the State of Alaska, LEO A. PHILLIPS, ALFRED M. WHITE and WILLIAM JONES, members of International Union of Operating Engineers, Local 302,
Appellants,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, WILLIAM TYREE, CLARK WRIGHT, DONALD E. CONNER, ARLIN A. DECHANEY, and NATIONAL LABOR RELATIONS BOARD,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA,

Consolidated Cases Nos. — J-18-67 and J-19-67, Reported in 287 F.Supp. 589 (D. Alaska, 1968)

MOTIONS TO DISMISS AND/OR AFFIRM

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Supreme Court of the United States

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MOTIONS TO DISMISS AND/OR AFFIRM

I

MOTION TO AFFIRM

All appellees, except the National Labor Relations

Board, move to affirm the judgment below pursuant to Rule 16 on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

II

STATEMENT IN SUPPORT OF MOTION TO AFFIRM

The Three Judge Court below stated in part:

> "Since the question is so clearly free of doubt . . . [further litigation] would have served no useful purpose." (App. to Jur. St. p. 16)

The decision below was clearly compelled by *Hill vs. Florida,* 325 US 538; *Plumbers' Union vs. Borden,* 373 US 690; and *Local 24, International Bro. of Teamsters vs. Oliver,* 358 US 283.

Other cases cited by the Court below or herein lend interpretive value to the decisions in those three cases, or substantiate their continuing vitality, but those three cases appear conclusive of the issues involved in this case.

For brevity, the International Union of Operating Engineers will hereinafter be referred to as the International, whereas, the International Union of Operating Engineers, Local 302 will be referred to as Local 302.

Local 302, whose main office is in Seattle, Washington maintains offices in Juneau, Anchorage and Fairbanks in Alaska and Wenatchee, Yakima and Mt. Vernon in Washington. In other areas it works through the nearest Building Trades Council (Doc. No. 7. Vol. I).

Prior to 1967, Local 302 had, pursuant to elections duly held, been certified by the National Labor Relations Board as the collective bargaining representative for employees of more than sixty employers doing business in the State of Alaska, including, as one employer, the Alaska Chapter of the Associated General Contractors of America which was comprised of different individual contractors who, at that time, numbered in excess of forty members (Doc. No. 7, Vol. I).

In 1967 the legislature of the State of Alaska enacted a law, set forth as Appendix "D" of the Jurisdictional Statement, which made it a crime, with a fine of not less than $1000 nor more than $10,000 for a ". . . national or international labor organization having 100 or more members in good standing who *reside or work* in Alaska . . ." not to have duly chartered locals in the state. (Emphasis supplied)

The International admittedly did not have any separately chartered locals in Alaska.

At this point, of course, Local 302 could not continue to carry out its duties as certified collective bargaining agent as those duties are described and defined by the Labor-Management Relations Act of 1947, as amended, (29 USC 151 ff) without subjecting its International to criminal prosecution.

There is nothing in the Labor- Management Relations Act of 1947, as amended, (29 USC 151 ff) which would have prevented any group of Alaskans from forming their own union and having participated in the sixty some elections which were held upon the petitions of Local 302. Nor is there anything in the

Act that would even now prevent the filing of petitions by such groups at appropriate times.

Subsection (4) of Section (2) of the Act (29 USC sec. 152) reads as follows:

> "The term 'representatives' includes any individual or labor organization."

Subsection (5) of the same section reads as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours employment or conditions of work."

Section (9) (a) of the Act (29 USC sec. 159) reads in part as follows:

> "Representatives designated or *selected* for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . " (Emphasis supplied)

The effect and meaning of the 1967 Statute of Alaska was that the employees of an appropriate unit could not exercise the rights guaranteed under Section 9 to select a collective bargaining representative, as that term is defined in the above quoted sections, if that representative happened to be affiliated with an international union which did not have a chartered local in the state without the threat of criminal sanctions being imposed.

The State filed several criminal actions against the International, Local 302 and its representatives and agents (Exs E & F to Doc. No. 1, Vol. I). Also a civil action was commenced by the State in the Superior Court for the State of Alaska bottomed on the statute seeking various forms of injunctive relief (Ex G to Doc. No. 1, Vol. I).

Certain regulations having been promugulated by the State to implement the statute in the meantime (Ex A to Doc. No. 1, Vol. I & Ex D to Doc. No. 1, Vol. III) the Associated General Contractors of Alaska, with whom Local 302 had a contract, served notice that they declined to comply with the contract until determination of the question of the validity of the Alaska statute (Ex E to Doc. 1, Vol. III).

These two actions were commenced, one J-18-67, being brought in the name of several individual members of Local 302 and Local 302 itself. The International intervened as a party plaintiff in that action (Doc. No. 41, Vol. I). This action was instituted against the various officials of the State of Alaska charged with the enforcement of the statute and sought to declare the statute unconstitutional and enjoin enforcement.

The second action, J-19-67, was brought by Local 302 against the Alaska Chapter of Associated General Contractors of America, Inc. seeking specific performance of its contract (Doc. No. 1, Vol. III). The State of Alaska intervened in that case as a defendant because the issues framed in that case likewise centered around the constitutionality of the Alaska statute. Local 302 then likewise prayed for relief against the Intervenor State of Alaska (Doc. No. 15,

Vol. III).

Plaintiffs asserted several grounds of unconstitutionality which are set forth in the opinion of the Court below (See page 9, app. Jur. St.)

The following language from this Court's decision in *Hill vs. Florida,* 325 US 538, effectively demonstrates the invalidity of the Alaska statute:

> "[1] It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. *Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications.* (emphasis supplied)
>
> "Section 4 of the Florida act circumscribes the 'full freedom' of choice which Congress said employees should possess. It does this by requiring a 'business agent' to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that Section 4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for

the workers' judgment.

"Thus, the 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that Section 4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581; Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 62 S.Ct. 491, 86 L.Ed. 754; Napier v. Atlantic, Coast Line R. Co., 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432. It is not amiss, however, to call attention to the fact that operation of this very section has already interfered with the collective bargaining process. An employer before the Labor Board defended its refusal to bargain with a duly selected representative of workers on the ground that the representative had not secured a Florida license as a business agent. In the Matter of Eppinger & Russell Co., et al., 56 N.L.R.B. 1259. The Board properly rejected the employer's contention, holding that Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.' Cf. N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170.

"Since the Labor Board has held that an employer must bargain with properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But, here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of a contempt for doing that which the act of Congress permits him to do. Furthermore, he

could, under Section 14 of the state law, be convicted of a misdemeanor and subjected to fine, and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that Section 4 of the Florida Act is repugnant to the National Labor Relations Act.

"Section 6, as here applied, stands no better. The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. Cf. Western Union Telegraph Co. v. Commonwealth of Massachusetts, 125 U.S. 530, 553, 554, 8 S. Ct. 961, 965 966, e L.Ed. 790; Kansas City Southern R. Co. v. Kaw Valley Drainage District, 233 U.S. 75, 78, 34 S. Ct. 564, 565, 58 L. Ed. 857, St. Louis Southwestern Ry. v. State of Arkansas, 235 U.S. 350, 368, 35 S. Ct. 99, 204, 599 L. Ed. 265. This is true because if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdeameanor section of the act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act."

As stated by the Court below any doubt as to the continuing vitality of the decision of *Hill vs. Florida,* 325 US 538 was dispelled by its recent approval in

the case of *Nash vs. Florida Industrial Insurance Commission,* 389 US 235.

Alaska relies in large measure on *DeVeau vs. Braisted,* 363 US 144. Appellant states (Jur. St. p. 19): "There is no *requirement* of Congressional approval in *DeVeau* or in any other case . . . ." In *DeVeau,* this court distinguishing *Hill* specifically said: "An element *most persuasive here, Congressional approval* of the heart of the State legislative program explicitly brought to its attention, was not present in that [Hill] case." (emphasis supplied)

This Court also noted in *DeVeau* ". . . that the challenged State legislation was part of a program, *fully canvassed by Congress through its own investigations, . . .*" (Emphasis supplied). These quotations from *DeVeau* were cited and analyzed by the Three Judge Court below. The Court concluded that these distinctions made the doctrine of *Hill* rather than that of *DeVeau* applicable to the present case.

The 1968 amendments adopted by the legislature of Alaska, which are contained in Appendix "E" of the Jurisdictional Statement, added to the penalties; specifically provided for civil enforcement by injunctive relief and added a new crime for "interference in chartering". Since the Court below invalidated the Act of 1967 (which would carry with it invalidation of the 1968 amendments), it seems unnecessary to advert further to the amendments of 1968 except to point out that the type of burdens and strictures, common to those stricken down in *Hill vs. Florida,* supra, were increased.

By like token, since the decision of the Court below

struck down the laws of 1967, we do not here more than mention the fact that the 1968 amendments permitted exemptions from criminal prosecution to unions which included "local hire preference provisions" in all of their agreements. Similar exemption is denied to other unions who would equally be guilty of violation of the criminal provision but whose contracts were different. The 1968 amendments clarify the clash with the doctrine of *Local 24 of IBT vs. Oliver,* 358 US 283 and the conflict with the equal protection clause. *Mullaney vs. Anderson,* 342 US 415; *Brown vs. Anderson,* 202 F. Supp. 96 (Involving Alaska resident preference statutes or regulations).

This brings us to the state court civil injunction proceedings initiated by the State. Prior to the hearing by the Three Judge Court, a preliminary injunction was granted in this state court proceeding which pertained solely to the operation of Local 302's hiring hall and it's procedures. Although the complaint in that case (p. 19 of Jur. St.) alleged violation of the so called "Local Autonomy Act", and although counsel now chooses to designate it as a "public nuisance" action, the preliminary injunction is defended upon the ground that it is warranted by this Court's ruling in *Vaca vs. Sipes,* 386 US 171. The Three Judge Court below held that, instead, the action and the preliminary injunction granted by the Superior Court were invalidated under the ruling of this Court in *Plumbers' Union vs. Borden,* 373 US 690.

Vaca dealth with individual rights in the processing of grievances or enforcement of individual rights. *Borden* on the other hand, dealth with alleged discriminatory practices in the operation of a hiring hall. We quote from *Borden:*

> *"The problems inherent in the operation of union hiring halls are difficult and complex,* see Rothman, The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements, 48 Va L Rev 871, *and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency."* (Emphasis supplied) 373 US 696, 697

The case of *Ironworkers' Union vs. Perko,* 373 US 701, heard and decided at the same time as the *Borden* case, lends further support to the position that the *Borden* doctrine is applicable to the case at bar.

The court below placed its reliance upon *Borden* and the fact that hiring hall discrimination was there claimed as it was in the Superior Court action here.

However, in distinguishing *Vaca,* we cannot help but note another matter.

Certainly this Court in *Vaca vs. Sipes,* 386 US 171, was not intending to re-invalidate broad scale use of the discredited labor injunction. No injunction was involved there. *Vaca* dealt with an individual problem and its resolution. The injunction here applied to the entire operation of the union's hiring hall and purported to freeze it into operating under its contract provisions.

Such "freezing" is entirely inconsistent with the doctrine that collective bargaining is a continuing process, *United Steelworkers vs. Warrior & G. Nav. Co.,* 363 US 574 and the duty of the respective parties to apply, interpret, amend or even supplement a contract where necessary or desirable, *Humphrey vs. Moore,* 375 US 335, and *Ford Motor Company vs. Huffman,* 345 US 330.

Neither did *Vaca vs. Sipes* authorize the intrusion of a *state,* as distinguished from individuals or groups of employees themselves, into the collective bargaining process.

Official state intrusion into the free collective bargaining process interferes with the bargaining parties' federal rights. *Local 24 of I.B.T. vs. Oliver,* 358 US 283; *General Electric Company vs. Callahan,* (CA5 1961) 294 F.2d 60, Cert Dism 369 US 832; and *Pan Am Airways vs. California Division Labor Law,* 203 F Supp 324.

Vaca does not hold otherwise.

Therefore, it is clear that *Plumbers Union vs. Borden,* 373 US 690, is controlling here as to state court jurisdiction and *Vaca vs. Sipes,* 386 US 171 is not apposite.

III

MOTION TO DISMISS AS TO APPELLANTS LEO A. PHILLIPS, ALFRED M. WHITE AND WILLIAM JONES

All appellees, except the National Labor Relations Board, move the Court to dismiss the appeals of Leo A. Phillips, Alfred M. White and William Jones for the reason that they were not parties below.

IV

STATEMENT IN SUPPORT OF MOTION TO DISMISS AS TO APPELLANTS LEO A. PHILLIPS, ALFRED M. WHITE AND WILLIAM JONES

On May 3, 1968, Leo A. Phillips, Alfred M. White

and William Jones moved to intervene in Cause No. J-18-67 (Doc. No. 44, Vol. II). They appeared through their counsel, Savage, Erwin, and Curran (Doc. No. 46, Vol. II). Exhibits, including affidavits to which were attached numerous unsworn and unsigned documents, petitions, etc. were filed in support of the Motion to Intervene (Doc. No. 44, Vol. II). On May 22, 1968, an order was entered denying the motion of Phillips, White and Jones to intervene (Doc. No. 57, Vol. II).

No appeal was taken from that order.

Thereafter those proposed intervenors played no additional part in the case. They were, for example, not parties to the stipulations of facts upon which the cases were tried (Doc. No. 67 & 68, Vol. II). Neither were they mentioned in the Court's opinion below (Doc. No. 70, Vol. II) nor in the judgments entered (Doc. No. 74, Vol. II). (There were two judgments entered in the two consolidated cases although only one, and that an incorrect copy, is included in the appendix to the Jurisdictional Statement.)

When counsel for the State of Alaska filed his amended notice of appeal on August 26, 1968 (Doc. No. 75, Vol. II), he included the proposed intervenors, although he had not purported to represent them before.

If the proposed intervention was of right or the denial was an abuse of discretion, the order denying intervention was an appealable order. *Brotherhood of Railroad Trainmen vs. Baltimore & O. R. Co.,* 331 US 519; *Missouri-Kansas Pipeline Co. vs. United States of America,* 312 US 502; *Textile Workers'*

Union of America vs. Allendale Co., (CADC 1955) 226 F.2d 765; *Nuesse vs. Camp*, (CADC 1967) 385 F.2d 694.

On the other hand, as pointed out by this Court in *Brotherhood of Railroad Trainmen vs. Baltimore & O. R. Co.*, 331 US 519 at 524, if denial was within discretion and was not appealable, and ergo, not reviewable here, it would be because there was some other remedy available to the proposed intervenors and their rights to proceed otherwise have not been impaired.

The practical effect in this case is that the appellants seek to bring before this Court the unsworn statements, unsigned petitions and other improper documentary material which were attached to affidavits in support of the motion to intervene, which were never moved against nor answered by the appellees and were never before the Three Judge Court, because of the order denying the intervention. The stipulation of facts, upon which the case J-18-67 was tried, signed by all parties, but not by the proposed intervenors, (Doc. No. 67, Vol. II) contained a provision that the affidavits submitted by "parties" could be considered by the Three Judge Court. Appellants, by seeking to make these proposed intervenors parties to this proceeding in the Supreme Court, are apparently attempting, ex post facto, to now make them "parties" under the stipulation and hence, get before this Court the documents referred to above.

Therefore, it is respectively submitted that since the proposed intervenors, Philips, White and Jones, were not parties to the proceedings below and did not appeal from the order denying intervention, their appeal should be dismissed.

CONCLUSION

It is respectfully submitted that there is no substantial question but that the Alaska Statute is unconstitutional under *Hill vs. Florida,* 325 US 538 and *Local 24 IBT vs. Oliver,* 358 US 283, and that the Alaska state court lacked jurisdiction of the civil injunction suit under *Plumbers' Union vs. Borden,* 373 US 690 and that therefore, plenary consideration and oral argument are not necessary and the judgment below should be affirmed. Further, the attempted appeals of the rejected intervenors, Philips, White and Jones, should be dismissed.

Respectfully submitted,

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Attorneys for all Appellees except the National Labor Relations Board

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 734

STATE OF ALASKA

and

WALTER J. HICKEL, Governor of the State of Alaska, G. KENT EDWARDS, Attorney General of the State of Alaska, THOMAS J. MOORE, Commissioner of Labor of the State of Alaska, LEO A. PHILLIPS, ALFRED M. WHITE and WILLIAM JONES, members of International Union of Operating Engineers, Local 302,

Appellants,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; WILLIAM TYREE, CLARK INGRAM, JAMES O. GREEN, KENNETH E. WRIGHT, DONALD E. CONNER, ARLIN A. DECHANEY, and NATIONAL LABOR RELATIONS BOARD,

Appellees.

Appeal from the United States District Court for the District of Alaska
Consolidated Cases Nos. J-18-67 and J-19-67,
Reported in 287 F.Supp. 589 (D. Alaska, 1968)

PETITION FOR REHEARING

G. KENT EDWARDS,
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IN THE

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OCTOBER TERM, 1968

No. 734

STATE OF ALASKA
and
WALTER J. HICKEL, Governor of the State of Alaska, G. KENT EDWARDS, Attorney General of the State of Alaska, THOMAS J. MOORE, Commissioner of Labor of the State of Alaska, LEO A. PHILLIPS, ALFRED M. WHITE and WILLIAM JONES, members of International Union of Operating Engineers, Local 302,

Appellants,

vs.

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Appellees.

Appeal from the United States District Court for the District of Alaska
Consolidated Cases Nos. J-18-67 and J-19-67,
Reported in 287 F.Supp. 589 (D. Alaska, 1968)

PETITION FOR REHEARING

Appellant presents its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Appellant, State of Alaska, presents its petition for a rehearing of the cause, and in support thereof respectfully submits that the questions in issue before this Court on appeal were too important and complex to have been disposed of by summary affirmance without an opportunity for the State of Alaska to argue its case orally. The State's argument in support of this contention is threefold and will be set out separately below.

I

THE ISSUES ON APPEAL WERE SUFFICIENTLY COMPLEX THAT SUMMARY DISPOSITION HAS LEFT THE LAW IN DOUBT.

The State's appeal raised substantial questions concerning the application of the pre-emption doctrine to situations, such as this, involving a union's unfair representation of its members' interests. *Vaca v. Sipes,* 386 U.S. 171 (1967), is strong authority for the State's position that pre-emption did not deprive the State of its right to challenge union practices which are arbitrary, discriminatory and in bad faith. As recently as *Glover v. St. Louis - San Francisco R. Co.,* 37 U.S.L.W. 4084 (U.S. Jan. 14, 1969), this Court reaffirmed its policy that a futile exhaustion of administrative remedies is not necessary where mem-

bers of a union seek court relief from union discrimination. Yet in the case at bar, the Alaskan members of Local 302 are totally without leverage to reform the union's dispatching policy (see appellant's Jurisdictional Statement at 7), and any effort spent to internally change the union would be futile. It would seem rather illogical to hold that, merely because relief from the union's discriminatory practices is being sought by the State in behalf of the complaining union members rather than directly by the union members themselves, the rationale of *Vaca* and *Glover* is inapplicable to the case at bar. Surely it is understandable that the Alaskan union members cannot afford the great expense of prosecuting to completion their own suit, as was done in *Glover,* in that the activities of Local 302 have kept the majority of them from working and earning any wages at all. It was because of the utter futility of an internal union struggle and the total financial inability of the Alaskan members of the union to fully protect their rights that the State acted through the legislature and through the courts to protect the interests of both the State and the Alaskan members of Local 302. In short the State has been acting, nearly from the first, as *parens patriae* for the union members residing in Alaska.

Where, as here, the State's interest is so great that nearly every phase of the economy is adversely affected, and where public order is threatened, the State acts both in its own behalf and in the behalf of that particular group of residents most immediately in-

jured by the discrimination: the Alaskan members of Local 302.

The district court appeared to ignore the State's position that it represents the interests of both the State and its resident union members. This position is crucial to an understanding of the State's claim that *Vaca v. Sipes, supra,* is the authority which controls this case, and that *Hill v. Florida,* 325 U.S. 538 (1945), does not apply where members sue their union on the ground of unfair representation and where exhaustion of internal remedies would be futile. The following quotation from the district court opinion underscores the State's contention that the district court did not give *Vaca* adequate consideration:

> "We find that all concerned—the public, labor, and employers, are most efficiently served by authority vested by Congress in one federal agency, empowered to reach across the entire nation and bring national consistency to the broad field of labor relations and the related complex problems arising thereunder. The result would be chaotic in the absence of such consistent policy. Certainly it is not intended that each of the hundreds of state courts of the several states be at liberty, individually, to decide these issues, national in scope and implication. Congress so empowered the National Labor Relations Board, and to that agency, for these purposes, it granted exclusive jurisdiction." (287 F.Supp. at 595.)

The State believes that this is a flawed interpretation of the law as it now stands, and fails to recognize and apply the exceptions stated in *Vaca v. Sipes.*

> The district court stated that "clearly" this Court did not intend that state courts were henceforth to have concurrent jurisdiction with the National Labor Relations Board of all unfair labor practice proceedings in which discriminatory conduct is alleged. (287 F.Supp. at 595.)

In footnote, the district court supported this conclusion by reference to *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Still in footnote, the district court acknowledged that

> *Vaca* does, however, seem to leave undecided the standard for determining when it can be fairly inferred that Congress intended exclusive jurisdiction to lie with the National Labor Relations Board. (287 F.Supp. at 595, n. 20.)

Petitioner urges that the district court failed to apply *Vaca* to the situation now in issue, and that factual similarities are such that *Vaca* is controlling authority. *Glover's* recent holding is an indication that this Court has determined that the standard of *Vaca,* referred to as "undecided" by the district court, covers the present case where futility and unfair representation are both present. By summarily affirming the district court, this Court has lent the weight of its affirmance to the district court's statement. Yet in the face of *Vaca,* that statement appears to be incorrect.

II

ADDITIONALLY, THE ISSUE OF LOCAL HIRE IS THE MOST PRESSING OF ALASKA'S LABOR PROBLEMS.

The State of Alaska has an overriding interest in reducing the unemployment among the skilled Alaskan members of Local 302. As described in detail in the appellant's Jurisdictional Statement at 6-8, the respondent union has continuously discriminated against its Alaska members by dispatching members from other states to fill Alaska job openings. This discrimination has forged a chain of economic hardship. Entangled in that heavy chain are the union's Alaska members, the employers who must hire outsiders whether or not their skills are as great as those of the Alaskans, the customer who must absorb the additional expense, and the taxpayer who supports the idled Alaskans. The nonresident workers, although they are obligated to pay state income tax on their Alaska wages, do not often invest in the State's economy. They purchase fewer consumer goods and do not usually own property taxable in Alaska. Their wages often support out of state families, and much of the money they earn leaves the State.

There is also an increasing danger of labor violence in Alaska. The seeds of this potential violence are the economic hardship and the frustration created by the union's baseless discrimination. For all its recent progress, Alaska can be physically hostile to human life, and because of the high cost of living, employment is absolutely necessary to insure the adequate food and shelter which are prerequisites to survival in such an environment.

In the face of these circumstances, the State respectfully submits that the importance of this case to Alaska and its union members requires more than summary disposition without a hearing.

III

FINALLY, BY RENDERING A SUMMARY DECISION, THIS COURT GAVE ALASKA NO GUIDELINES ON MEETING AN IMPORTANT PROBLEM.

Other states, such as Kentucky, stand in similar posture with similar situations and statutes, such as Kentucky Revised Statutes 336.170. The question will work its way through the courts again unless it is decided now.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted, and that, upon further consideration, the judgment of the District Court of Alaska be reversed.

Dated, Juneau, Alaska,
February 5, 1969.

Respectfully submitted,

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By: ROBERT L. HARTIG,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

I, Robert L. Hartig, counsel for the above-named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ROBERT L. HARTIG,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ALASKA ET AL. *v.* INTERN'L UNION OF OPERATING ENGINEERS, LOCAL 302.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA.

No. 734. Decided January 20, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.